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REASON

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May 1995

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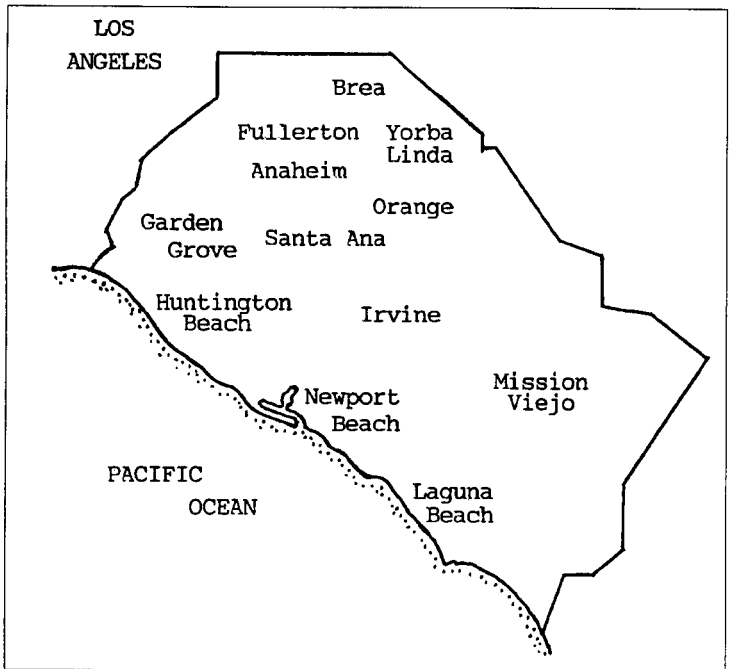
THE ORANGE COUNTY OPPORTUNITY:

Downsize and Privatize Without New Taxes

By Chris Norby
Fullerton City Councilman and Candidate for the California State Assembly from the 72nd District



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Chris Norby is a 10-year Fullerton City Councilman and candidate for the California State Assembly.

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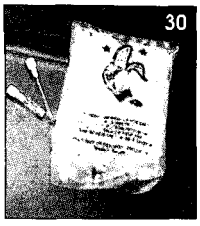

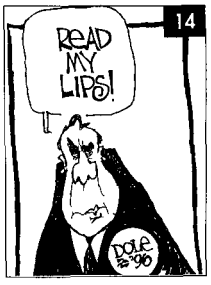

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Curb Your Dog!

By Virginia I. Postrel

What the rest of us want from Washington

YOU'RE JOGGING DOWN YOUR neighborhood street, as your large Labrador retriever bounds along beside you, occasionally heading into a front yard to sniff out things of interest to dogs, occasionally leaving an unwelcome calling card for the neighbors to clean up. You round a corner and there, playing happily in the grass, is a little girl, maybe 4 years old, whose mother is watching her from a lawn chair.

Intrigued by the little girl, the dog heads over to her. He is as big as she is, and much stronger. As he sticks his slobbery jowls in her face, she flinches, stands up, backs off, falls down, cries. The dog continues toward her, relentless in his curiosity.

If the mother is like most mothers, and you are like most dog owners, both of you sympathize with the dog. You try to disabuse the little girl of her fear. "It's OK," you say. "He won't hurt you. He loves children."

And children love dogs. Everyone knows that—and so should she.

"Nice doggie," says the mother, rising from her chair. "Don't be afraid. He won't hurt you." She pushes her daughter toward the animal. The little girl continues to squirm and cry, trying to escape the advancing giant. "I don't know what's wrong with her," the mother says to you. "She just doesn't like dogs."

No, this isn't an autobiographical story. It's an attempt to explain the attitude people in official Washington have toward Americans who flinch in fear at the advances of the allegedly benevolent state. Where the rest of us see a giant creature with sharp teeth and claws, they see only a friendly pet.

At one level, you can't exactly blame them. They live every day with the federal government and its employees. Just about everyone they meet, socialize with, work with, or marry is either a government employee, a lobbyist, or a journalist. They understand "the system," and know its operators. They can't fear what they know so well.

For the rest of us, even those of us who know more than a few government officials, the government—state and local as well as federal—is mainly something to be avoided between occasional trips to the post office. For us, the voice saying, "I'm from the government and I'm here to help you," is not our old friend Paul calling about a job opening in the interstices of the Commerce Department. It's the local building inspector snooping around our bathroom remodeling job, delaying it by a month. It's the OSHA official informing us that we'll be spending half a day sitting in a lecture on how to avoid stress. It's the INS demanding to see our work papers. It's the EPA decreeing that we start car pooling. Or it's the IRS informing us that we've been selected for an audit.

When Washingtonians, of whatever political persuasion, pretend to be "of the people," they tend to come off as phonies—and for good reason. They can put on flannel shirts and talk in the accents of Memphis or Missouri, but they still look at the dog from the owner's perspective, not the little girl's. There are exceptions, of course. Rep. Tom DeLay's experience running an extermination business probably did instill a certain permanent fear of the EPA. But on the whole, Washingtonians just can't see the federal government (and, by extension, government in general) as something scary. And they have little sympathy for anyone who can.

That's why you can go around Washington talking about the importance of welfare reform or dynamic budgeting, but you should never mention the word *tyranny*. You can say government actions are inefficient, costly, or even unfair, but you can't suggest they're *dangerous*. That is gauche. It makes people roll their eyes. This isn't just a matter of preserving the importance of fine distinctions—an audit is not, in fact, the same as a midnight arrest by the secret police. It's that nobody in Washington can really believe that George down the block or Susan down the hall is a terrifying individual.

BUT THEY CAN READ THE POLLS. SO lately, Republicans in Congress have suggested that leash laws and pooper scooper measures might be a good idea—that if we can't get rid of the regulatory state, we might at least keep it under control. Regulators should have to prove that new rules will do more good than harm ("cost-benefit analysis") and they should have to pay the difference if they seriously degrade the use and value of someone's property ("takings" compensation). In other words: Curb your dog.

Respectable Washington, dog-loving Washington, finds such measures extreme, or corrupt. Only a ridiculous child or someone paid by the leash lobby could support such notions, they reason. After all, the nice doggie is our friend.

It's hardly a surprise that the last thing regulators want is restrictions on their freedom to roam or, worse yet, an obligation to clean up their own messes. "The agencies can't possibly go through all of these steps of review without years of delay. It's a greater threat than I've ever seen before in my political life," says Rep. Henry Waxman (D-Calif.) of cost-benefit requirements.

When Newt Gingrich accurately calls David Kessler "a thug and a bully" for using the FDA to terrorize everyone from mom-and-pop vitamin distributors to multinational pharmaceutical companies,

Someone should take this whole clean water issue and bury it.

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Waxman worries that Gingrich is trying to "intimidate" the agency. "I was stunned by the supercharged words he used against Kessler," Waxman told *National Journal*. "It seems like he's trying to bully the agency." Waxman should know; as a committee chairman in the old Congress, he took bullying to a high art.

Republicans are, however, also dog lovers. While they demand leashes and pooper scooping for the Labs and Irish setters, they're equally insistent that we let the Dobermans and pit bulls run free—for our own protection, of course. Hence their disdain for the Fourth Amendment, that antiquated statute that conceived of every government as a potential tyranny. Hence their demand for ever-longer sentences for people who use or sell drugs. They assume, probably correctly, that no one *they* know will ever be affected by such laws—and not because no one they know will ever break them.

Indeed, it's a barometer of official Washington's attitudes that you can count on your thumbs the articles on the drug war published in *The New Republic* over the past half-dozen years—though if *Vanity Fair* is to be believed, the magazine's literary editor had an early '90s coke habit that would have gotten a less privileged man a lengthy prison term. Worrying about how non-insiders fare in the legal system is, however, much too crass for Georgetown partygoers. It suggests that non-insiders matter.

Alexis de Tocqueville, a man more quoted than read in Washington, provides some insight on the gulf that has developed between official Washington and the America it rules. He suggested that when citizens see one another as civic equals, they identify with each other. As a result, they develop sympathies that prevent the sorts of tortures aristocrats used to inflict on uppity peasants.

But such sympathies are missing in a capital insulated from its own depredations. Who in official Washington fears EPA enforcers or INS raids? Who in official Washington struggles with OSHA requirements or trembles at the threat of a liability lawsuit? Who in official Washington need ever fear a decades-long prison sentence for drug conspiracy? Who in official Washington has any chance of getting lost in a system beyond his comprehension, a system populated by strangers with strange ways?

And why, given that no one in official Washington faces such threats, do we expect them to call off the dogs?

Cereal Killers

By Nick Gillespie

Stop Congress before it strikes again.

IT IS TEMPTING TO DISMISS THE RECENT howling by Reps. Sam Gejdenson (D-Conn.) and Charles Schumer (D-N.Y.) for federal investigation of the ready-to-eat cereal business as just another pathetic dog-and-pony show designed to score a couple of enterprising pols some free media coverage. But the congressmen's jeremiad is so overblown and their call for antitrust action so ludicrous that it is worth pausing over the matter. Such self-aggrandizing complaints perfectly illustrate political hubris at work—and such calls to legislative arms all too often result in action.

"We are paying caviar prices for cornflakes quality," proclaims Schumer, reportedly an "avid muncher" of Cookie Crisp and Frosted Flakes. In a report titled *Consumers in a Box*, Gejdenson and Schumer say, "The four largest cereal companies—Kellogg, General Mills, Post, and Quaker Oats—control nearly 85

percent of the market" and, "as a percentage of the retail price, the cereal industry devotes more money from sales to marketing and profit than any other food surveyed." The congressmen also charge that since 1983 the average price of cold cereals has risen 90 percent, twice the rate of increase for other foods, and that cereal has the highest profit margin of any food product.

"As you know,...high profit margins may be the result of collusive behavior.... This industry has ceased to be responsive to consumers and market forces," wrote Gejdenson and Schumer in a letter to Attorney General Janet Reno. "Consumers don't have a real choice in this market."

The congressmen's professed concern for the three-fifths of children who have cereal for breakfast every day led them to ask Reno to "inform [them] of the actions that can be taken to change the pricing structure of the industry."

"The...cereal companies can easily reduce their prices and still realize a reasonable profit," concludes *Consumers in a Box*. In other words, it may be time to nationalize the cereal business.

IT IS HARD TO KNOW WHICH IS MORE DISturbing: Gejdenson and Schumer's weak grasp of the situation or their arrogant proposal to "change the pricing structure" of an entire industry so that it fits their fancy. Regardless of the congressmen's assertion, consumers retain the "realest" choice imaginable regarding cereal: not to buy it in the first place. But consumers freely choose to buy more than 2 billion boxes annually.

A chief reason is economic: On average, a bowl of cereal costs between 15 cents and 30 cents, including milk. When adjusted for coupons, cereal prices have risen between 1 percent and 2 percent annually since 1989—lower than the rate of inflation. Since 60 percent of all cereal is bought with coupons or while on sale, that is of no small consequence.

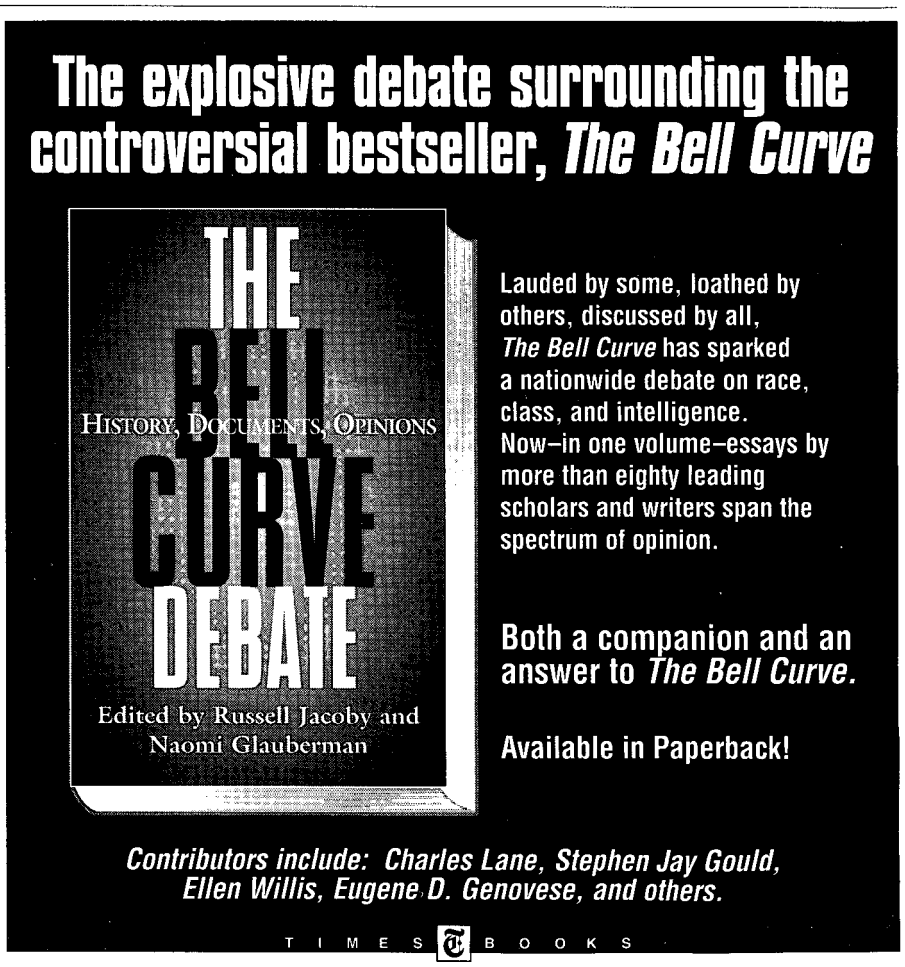
Indeed, last May General Mills cut the prices of its top-sellers by 11 percent. Earlier this year, Quaker Oats introduced a line of bagged cereals that retail for about $2.00 a unit. Budget-conscious shoppers can opt for generic, in-store brands and save about a buck-and-a-half per box.

The congressmen admit as much, but as Schumer has lamely countered, it's often difficult to locate generic brands on store shelves. If that sums up Gejdenson and Schumer's opinion of typical consumers, it's no wonder they feel a need to shelter such tender souls from the harshness of the marketplace.

In fact, protecting consumers goes hand in fist with punishing cereal producers. Schumer complains that the "high" price of cereal proves "the free market isn't working." "Why should a box of cereal, made of cardboard and containing nothing more than grain, cost an arm and a leg?" he asks. There's a simple answer, but it's one that Schumer is not willing to consider, since it leaves him out of the power equation: That's what people are willing to pay. The ultimate price at which a product moves off the shelf is a function of supply and demand, not simply the cost of production.

Similarly, it is far more likely that the industry's higher-than-average profit margin results from producers' abilities to minimize costs while providing a popular product than from "collusive behavior." Just this past February, U.S. Second District Judge Kimba Wood shot down the state of New York's challenge to Kraft's 1993 acquisition of RJR Nabisco's cereal division, noting that it would be highly unlikely and extremely difficult for the big cereal firms to rig prices. Competitors, after all, do like to compete.

And, unfortunately, politicians like to legislate. If they fancy themselves capable of determining "reasonable" profits for Cap'n Crunch and Count Chocula, it's only a small leap to do the same for caviar, for cars, and for any other industry that dares to turn a profit.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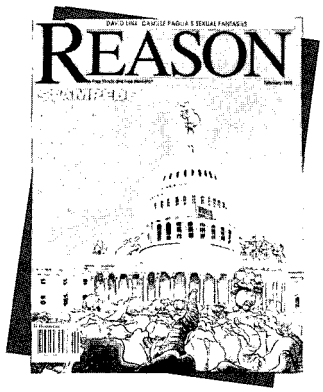

Elephant Talk

One important item you missed for the new congressional agenda ("Capitol Ideas," Feb.) is income-tax reform. Dick Armey (R-Tex.) has a flat-rate tax proposal of 17 percent, with a personal deduction of around $13,000. Another Texas Republican, Bill Archer, would go even further and replace the income tax with a broad-based tax on consumption. Meanwhile, Richard Gephardt (D-Mo.) has his own plan with a lower rate for low incomes (10–11 percent) and a higher, unspecified rate for "the rich."

It would be incredibly invigorating if Congress actually passes a low and simple tax-rate system, giving millions of dollars back to beleaguered taxpayers, and unleashing a new economic renaissance. Let's hope they have the foresight to do it.

Brent J. Bielema
Fulton, IL

Democrats, New and Old

In his otherwise cogent prescription for a new Democratic Party ("The Center Folds," Feb.), Joel Kotkin never gets around to spelling out a pocketbook issue that would connect with young, high-tech workers.

One way for Democrats to get on the correct side of a money issue for both middle-income working families and the young would be to attack payroll taxes, the 7.51 percent Social Security levy in particular. This is an area where Republicans intend on doing nothing despite the prospect that the system will not last past 2010 as it is currently constituted.

Newt Gingrich himself knows that the system is doomed but has made the political calculation that it is better to do nothing for now. Back in 1982 he talked about replacing the system with a private one and in 1986 floated the idea of replacing the payroll tax with a dedicated VAT. By 1990, he was loath to sign onto the Wallop-DeLay plan (which would have cut both payroll taxes and capital gains taxes) at a time when it was the only tax-cut plan which broke out of the pay-as-you-go straitjacket. In short, Gingrich and the GOP have abandoned the field.

The fact that Chile privatized its Social Security system with great success even provides an opportunity for those fact-finding trips to a developing country that Democrats seem to love. But from all indications, anything outside the purview of labor unions holds little appeal for today's Democratic Party.

Jeff A. Taylor
Gaithersburg, MD

Space Debris?

While I agree with the general thrust of T.J. Rodgers's "Technology Traps," (Feb.) and have admired his writing in the past, there are misconceptions, egregious accounting errors, and clear misstatements of fact in his discussion of the federal space program.

First of all, it is Boeing and McDonnell Douglas, not Boeing and Lockheed, who have teamed for the next reusable launch system, though Lockheed, as well as other companies, is expected to compete for it.

Second, contrary to confused reports by the general media, this launcher will not be a Shuttle II. Some elements within NASA might like it to be, but the immediate intent of the program is to build a relatively low-cost (not multibillion-dollar) X-vehicle similar to the X-15—an experimental launcher that will prove out the technologies necessary for a new generation of launch systems to dramatically reduce the cost of space access.

It is expected that these technologies will then be incorporated into an operational system that will be developed with private funding. If the perceived market for this operational vehicle is primarily NASA, then it will indeed become a Shuttle II (and will likely not occur).

On the other hand, if it is designed to satisfy new and growing commercial markets (e.g. low–earth-orbit communications, and my own business, space tourism), then its design will be driven by these market requirements, and it will have much more resemblance in its operations to an airliner than to the shuttle. In either case, any multibillion-dollar investment decision will be based on the demand for launch services, and the money will come from the capital market, not the taxpayer.

Such a program is more in the tradition of the original National Advisory Committee on Aeronautics (NACA), the agency that, with its labs, wind tunnels, and experimental aircraft, provided many of the core technologies that made our nation the leader in military and commercial aviation throughout this century, before it evolved into the present NASA in 1958. While far from ideal, it is a refreshing change from the current disastrous policy of having NASA attempt to develop the operational vehicle and run the airline.

Finally, Mr. Rodgers's discussion of space-based semiconductor manufacturing cannot pass without comment. Accepting for the sake of argument his figure of $500 million for a space shuttle flight (a number which is in continuous dispute), his article would imply first that an entire flight must be dedicated to the purpose of growing gallium arsenide crys-

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- How new "rights" not found in the Constitution (e.g., abortion, pornography) were created by Court fiat
- The difference between revolutionary and evolutionary socialism. How the latter dominated our government in recent decades — in everything but name

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tals and second, that five such dedicated flights were actually authorized and flown.

Both of these statements are clearly nonsense. Such an experiment would be only one of many on a given flight, probably occurring in the mid-deck of the Orbiter, with the major purpose of the mission determined by the many tons of payload in the payload bay itself, such as a satellite or Spacelab. To charge the entire cost of one, or five, flights to a single mid-deck experiment is, to be as charitable as possible, faulty bookkeeping. But this is what has to be done to come up with a figure of $100 million per wafer. This is surely high by a couple of orders of magnitude. I have no idea what the basis is for his stated eventual cost of $10,000 per wafer—this would depend upon, among other things, the success of the commercial reusable launcher described above in bringing down launch costs. He may be correct that gallium arsenide chip production is not an economically viable space manufacturing business, but he offers little useful information here in making such a determination.

Rand Simberg
President
Interglobal Space Lines Inc.
Redondo Beach, CA

T.J. Rodgers replies: I do not believe any taxpayers' money should go toward "Space Shuttle II" or the "X-vehicle." In the real, non-NASA world, the investment of even a few million dollars typically requires a precise business plan. If Mr. Simberg wants billions of dollars to go into the "space tourism" business, let him find a sucker other than Uncle Sam.

I agree that my applying the full cost of a shuttle flight to the gallium arsenide wafer experiment is bad accounting. But the experiment was one of the primary objectives of that flight. And the gallium arsenide experiment was carried out on a special second space vehicle deployed from the shuttle. The stated $10,000 per wafer manufacturing cost came directly from the group performing the experiment. From my own gallium arsenide work, I know the $10,000 figure is unacceptable—and probably unachievable, based on NASA's financial track record.

Ratings War

Rick Henderson's trend on congressional ratings from the Council for Citizens Against Government Waste (CCAGW) ("Grade Inflation?," Jan.), implied that the 1994 numbers were "fixed" in favor of Democrats. In particular, Dan Mitchell of the Heritage Foundation claimed that CCAGW was "naive or simplistic" with its ratings and clearly had in mind improving Democrats' scores. His false characterization of the ratings must extend to the bipartisan co-chairmen of the Congressional Grace Caucus, along with the Republican and Democratic Senatorial and Congressional Campaign Committees, all of whom reviewed the ratings prior to their publication.

Mitchell's charges and your article are outrageous and absurd, especially when your reporter appropriately stated that: "The gap between Democrats and Republicans is fairly consistent with those in earlier sessions of Congress." Then, he went on to fabricate a story where none exists.

CCAGW has but one objective, and it has not changed in the past decade: to urge the passage of legislation to end wasteful spending. Because congressional ratings reflect both the shifting composition of Congress and an ever-changing tapestry of legislation, it would be highly irregular if honestly nonpartisan ratings showed no anomalies. In fact, I am downright suspicious of groups claiming to be nonpartisan, yet which consistently follow a "party line." There are plenty of those thinly disguised groups in Washington, which determine the outcome before the game is played. CCAGW is not, and will never be, one of them.

There are good reasons why the National Service and the National Competitiveness Acts were not rated—they were not on CCAGW's agenda at the beginning of the 103rd Congress, and we don't ambush members without telling them in advance about rated votes. Regarding the House rule vote on congressional compliance, we didn't rate it because it would have only applied to the House for one session. The second vote would have permanently changed the law and was the real substantive vote.

I hope that REASON will not tilt at political windmills for pseudo-control of agendas, but rather work doubly hard to ensure that conservatives and anti-spending groups work together to assure a genuinely positive change in American politics to save our children and grandchildren from a crippling debt they can never hope to repay.

That is our agenda. Please do not let petty political control guide your thinking and evaluation. Too many depend on your reasoned independence.

J. Peter Grace
Chairman
Citizens Against Government Waste
Washington, D.C.

Rick Henderson replies: Mr. Grace's credentials as an vocal opponent of excessive government spending and regulation are unassailable. Unfortunately, his impassioned defense of CCAGW's rating of the 103rd Congress still leaves some questions unanswered. For instance, the group's decision not to rate votes on the national-service program—one of the few specific, big-ticket initiatives Bill Clinton consistently promoted throughout his campaign—is curious, to say the least. And Mr. Grace made no attempt to justify CCAGW's decision to include unanimous or near-unanimous votes in its ratings scheme. As my story pointed out, unanimous votes say nothing about the behavior of individual legislators, unless the group conducting the ratings wants to boost everyone's score.

Mr. Grace says CCAGW decides which votes it will rate at the beginning of the session. The votes it actually rated suggest much more flexible criteria than that. It rated the Penny-Kasich spending-cuts package, an important measure, to be sure—but Penny-Kasich was crafted in the fall of 1993, 10 months into the session. Indeed, 24 of the 37 House votes

rated were either on rules or on amendments to other bills, many of which were never dreamed of until long after the session began.

Mr. Grace says CCAGW takes great pride in being nonpartisan, which is indeed an attribute too few organizations in Washington value. But can CCAGW best fulfill its mission by not offending Democrats or by pointing out which members of Congress most effectively attack government waste?

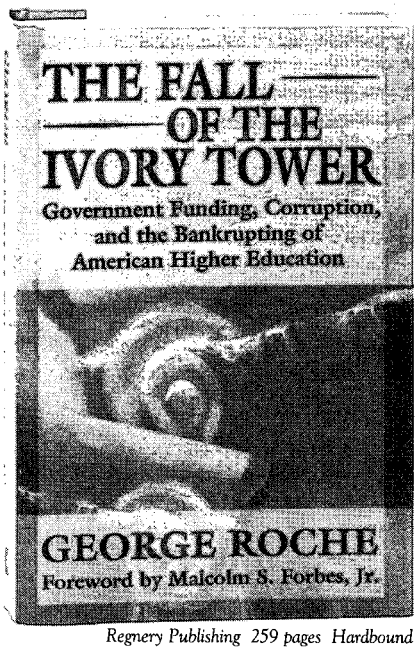
Bell Ringing

Tom Hazlett's article ("Ding Dong," Jan.) about *The Bell Curve* was fair, given the fact that it was (as he stated) based on the article by Richard Herrnstein and Charles Murray in *The New Republic*. However, the issue of the relationship of race and intelligence is just one segment of *The Bell Curve*. (Indeed, I feel that the authors did themselves no good by writing that essay, which was focused primarily on race.)

The thrust of the book is much broader, and its message is of importance to people concerned about liberty. Essentially the authors argue that intelligence is more important in coping with life's problems than many of us have thought. Second, because the United States is a meritocracy, people are being sorted, more and more, by intelligence. That is, in recent decades, many bright people have gone to college (that wasn't always the case) and the brightest of the bright are going to elite colleges. There they marry other members of what Herrnstein and Murray call "the cognitive elite," and they enter professions in which they interact primarily with other members of the elite. As a result, over the past few decades, very smart people, more than ever before, have acquired power, affluence, and prestige.

The problem that Herrnstein and Murray warn against is that the people in this power elite then try to make life difficult for the average person and especially difficult for people whose cognitive ability is quite limited. For example, they institute zoning rules that make it hard to build homes and regulations that make it hard to start small businesses, and they create government intervention programs that discourage marriage.

As the less-advantaged classes find life more and more difficult and sink into counterproductive behavior, the power elite isolates itself more and more. As time goes on, this elite becomes "increasingly frightened of and hostile toward the recipients of the welfare state," say Herrnstein and Murray. "The current symbol of this phenomenon is the gated community, secure behind its wall and guardposts." The authors anticipate that the result will be "an expanded welfare state for the underclass that also keeps it out from underfoot." They call it the custodial state and describe it as a "high-tech and more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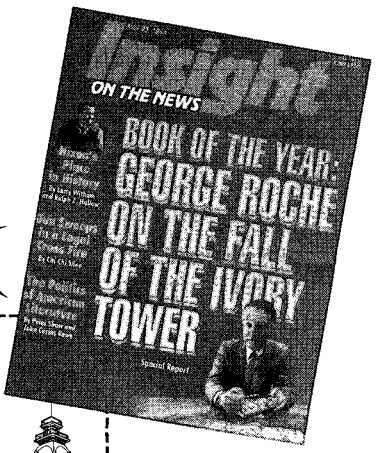

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***The Fall of the Ivory Tower* is featured as "Book of the Year" in an *Insight* magazine special report.**

lavish version of the Indian reservation."

This is a chilling vision of the future. It has little or nothing to do with race, and its message is something to which those of us who believe in freedom should pay substantial attention.

Jane S. Shaw
Political Economy Research Center
Bozeman, MT

Unlike many other reviewers of *The Bell Curve*, Tom Hazlett seems to admit that he has not read the book and is basing his comments on *The New Republic* article. That is truly unfortunate because Charles Murray, I believe, did himself a big disservice by publishing that piece. *The New Republic* article draws inordinate attention to the racial aspects of *The Bell Curve* and also introduces this peculiar idea of conservative multiculturalism.

On the other hand, some discussion of race was inevitable. The book addresses public policy on matters of social pathology and shows how those pathologies are correlated with intelligence. Because the policies are themselves so heavily "race-loaded," the diversion into race and ethnicity could not really be avoided.

Mr. Hazlett raises an interesting point about the ethnic aspects to the heritability of IQ by pointing out that the races themselves are not clearly identified and are subject to a huge amount of genetic dynamism. Interestingly, that has also been a response from some of my left-leaning friends and colleagues. Even Stephen Jay Gould has stated, quite correctly, that race is an anthropological abstraction. When *The Bell Curve* was first published, the response from the left was, among other things, that the book encourages group thinking. Now, I am hearing that there are really no groups at all. This is truly hilarious.

The left has created and been practicing identity politics (based on its own constituencies' preferred groupings) for quite a while. Now it chooses to attack *The Bell Curve* for group thinking and for the idea of "groups" altogether. If *The Bell Curve* has the effect of invalidating group think, it will have achieved an epic success. I am not, however, optimistic. The left's capacity for cognitive dissonance (i.e. hypocrisy) is unbounded. When it comes to sucking at the public trough—that is, using the political process to redistribute wealth and interfere with private parties' associational freedoms—the "group" will always be clearly visible and well defined.

David West
Encino, CA

Mr. Hazlett replies: It is curious that Charles Murray would publish a summary of his book in so visible an outlet, and not do justice to his own work. In excusing the summary and defending the book, neither Mr. West nor Ms. Shaw touches my basic criticism: The research developed in *The Bell Curve* has nothing interesting or hopeful to say about public policy.

Ms. Shaw's suggestion that this book teaches us that "intelligence is more important in coping with life's problems than we thought," reminds me that I have actually heard Dr. Murray tell reporters that one conclusion from his *Bell Curve* research is that our programs for unwed teenage mothers must be devised for people with relatively low IQs. What a marvelous breakthrough to find that the girls getting pregnant in junior and senior high school are not at the top of their class.

Still, I wonder: Does it take an IQ study to unveil the consumer-welfare hazards of zoning restrictions? This issue is more directly confronted by economic research on the advantages inflicted by the affluent on the less affluent. To traipse through the IQ debate is to take an analytical detour thousands of miles longer than the 10-minute ride to economic truth which the zoning laws require.

The debate cruises right through the racial IQ quagmire. Why go there? It must startle those who say that *The Bell Curve* involves only one chapter on racial IQs (including Dr. Murray) that this one modest little topic comes to dominate the debate—as laid out in Charles Murray's own summary in *The New Republic*. To abstract from this huge ugly issue is to ask, "Other than that, Mrs. Lincoln...."

The idea that the distribution of income is becoming more skewed due to cognitive differences has long been known and agreed to by analysts all across the political spectrum. Making it a matter of IQ differences, and linking this form of intelligence so strongly to genetic inheritance, is a dubious proposition which actually takes us backwards. It increases what individuals do not control and decreases what we expect people to achieve. More ominously, it steer us straight into the leftist folderol that sees group development as the proper way to view social science and social policy. Mr. West has good reason to be embarrassed about Murray's *Bell Curve* essay in *The New Republic*. Given Charles's previous work of such outstanding quality, it is a tragedy. But it is incorrect for Mr. West to dismiss the article as a marketing error. Give *The Bell Curve*'s author credit for honestly putting forth what his IQ analysis means for public policy: an intellectual cul-de-sac of racial IQs and "conservative multiculturalism."

Arresting Question

In the December 1994 issue, Nick Gillespie claims that one-third of all boys in this country will be arrested before 18 ("Arrested Development"). That's pretty difficult to believe! Could you please provide some support for this statistic?

Michael Freed
Inglewood, CA

Mr. Gillespie replies: The one-third figure in fact applies to *urban* areas. "Somewhere between 30 to 40 percent of all boys growing up in urban areas in the United States will be arrested before their eighteenth birthday," writes Peter W. Greenwood in the recently published collection, *Crime*. The figure for all boys, according to a 1986 National Academy of Sciences study, is 27 percent.

Correction

In the April editorial, "Artistic Licenses," the author of a *New Republic* article supporting PBS was misidentified. The article was by Robert Wright.

Do You Make These Mistakes in Job Interviews?

BY GARY BENCIVENGA

NEW YORK—Do you know why you should ***never*** eat a spinach salad when you're being interviewed over lunch?

If you're a man, do you know why you should ***never*** wear a *gold bracelet* to a job interview?

If you're a woman, do you know the type of blouse that makes interviewers of both sexes label you as a loser?

Did you know that arriving *too early* for an interview irritates many executives as much as showing up late?

According to a fascinating new report, these are but a few examples of innocent but costly mistakes almost everyone makes when job-hunting.

But these are small potatoes compared to the most common and deadly mistake of all—***not knowing how to position yourself as the #1 candidate in an over-crowded field of applicants.***

Here's the big problem you face....

Competition for white-collar job openings has grown so fierce that a single help-wanted ad in a major newspaper can pull in 2,000 or more resumes. That's more than seven large mail sacks bulging with resumes—*from a single ad.*

How can you beat odds like that?

This is the key question addressed by a riveting report that's just been released, ***Interviews That Win Jobs.***

Privately published and not available in bookstores, this quick-reading report is based on extensive research with hiring executives, recruiters, outplacement officers and other top experts on how to land lucrative job offers in today's tough white-collar job market.

The report even incorporates the results of video-taped studies, conducted through two-way mirrors, by placement services and universities. These studies have clearly identified what ***the most successful*** job candidates do differently than others to win many more job offers.

Of greatest value, the report reveals today's most powerful strategies for winning the job over hordes of other applicants, some of whom are bound to be better qualified than you.

Surprisingly, the report says that beating the odds can be much easier than you ever imagined *IF* you apply some simple rules of ***effective self-marketing.*** Indeed, since so few candidates are familiar with these strategies, they give you an enormous, almost unfair edge.

For example, the report explains:

❒ Why studies have proven that candidates with the best qualifications "on paper" usually *don't* get the job. You'll discover the factors that count for much more—and know how to stress them to gain a *tremendous* advantage.

❒ The simple 12-word sentence that will make you the #1 candidate more often than you'd ever believe.

❒ 11 ways to get interviewers to *like* you. (People only hire those they <u>like</u>!)

❒ A simple strategy to make yourself *three times* more likely to get hired.

❒ ***Interview Etiquette Checklist:*** Many "unwritten" rules you may be breaking.

❒ Worst times to schedule an interview. Your odds of getting hired are *very* low.

❒ The 25 biggest interview *turnoffs.*

❒ As revealed in *Forbes,* there's one *quirky* personality trait 98% of interviewers ***love*** to see. *Let them!*

❒ The mistake made by 90% of those fired from a prior job. *It can guarantee you won't be hired again soon!*

❒ How to skyrocket your number of job offers by making interviewers feel ***SAFE*** in hiring you.

The report also reveals how to make nervousness and body language work *for* you....How to wow them with your qualifications without sounding braggy, and...How skilled interviewers can detect when you're lying or "stretching."

There's more: How to get strangers inside the company to put in a good word for you....How to *dress* for interviews....The best way to establish rapport with your interviewer, and...How to avoid numerous little traps, sometimes placed in your path on purpose.

Finally, the report gives you a masterful way to "close the sale"—the single best strategy for making the short list of finalists, becoming the #1 candidate, then getting invited back to hear those magic words, ***"You're hired."***

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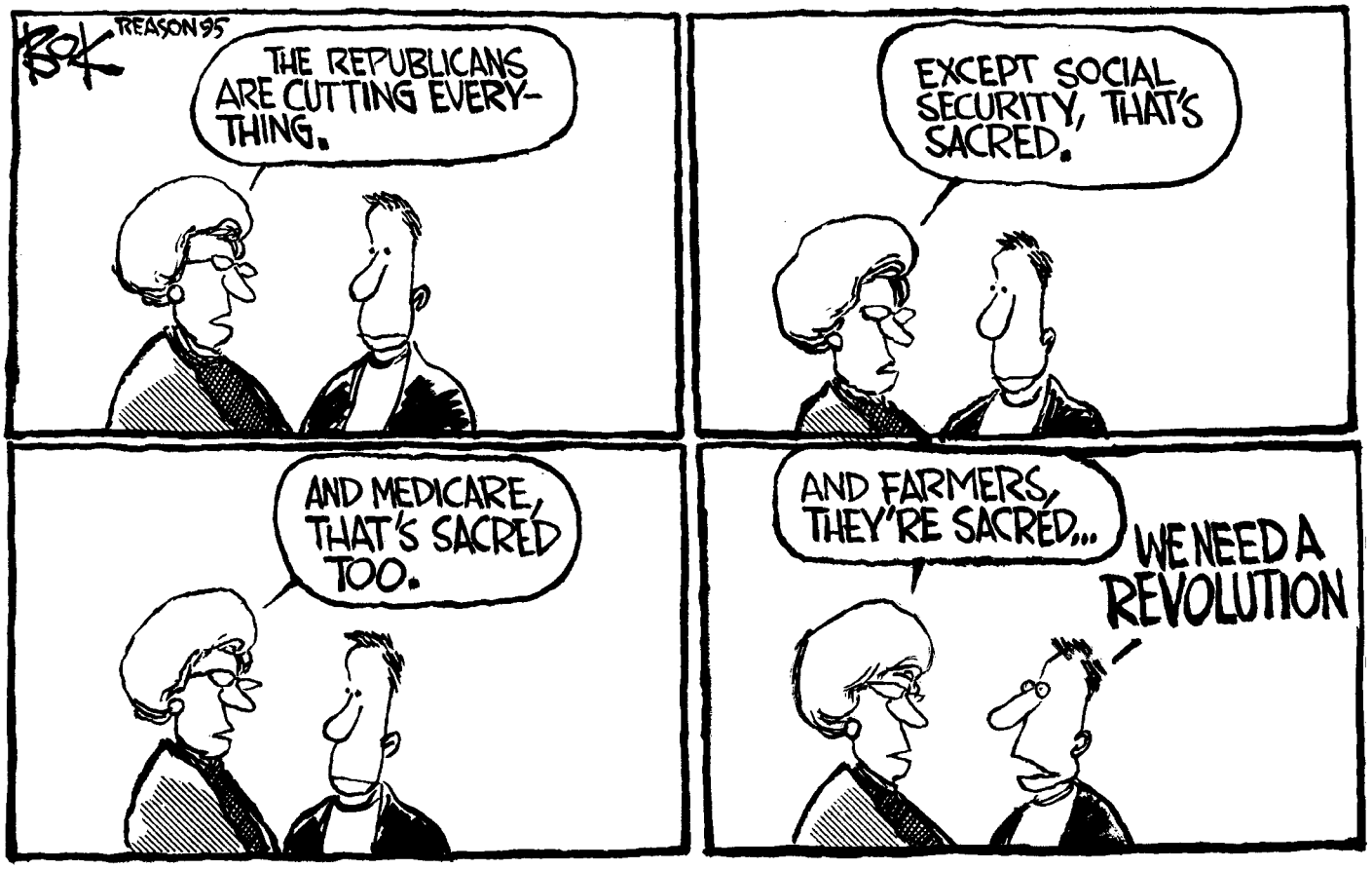
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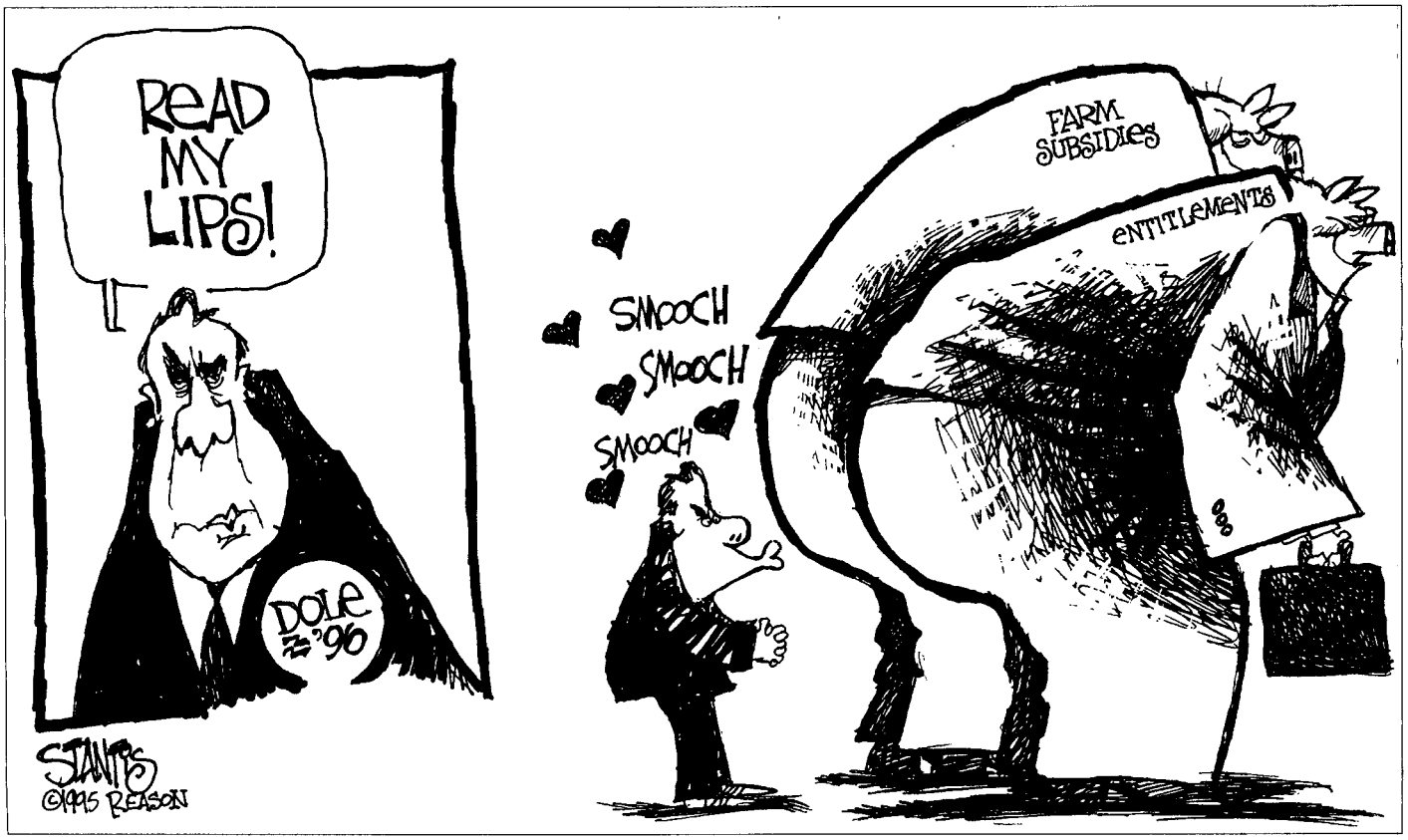


SCOTT STANTIS

IF THE NATIONAL ENDOWMENT FOR THE ARTS HAD FUNDED THE SISTINE CHAPEL CEILING...

From the *National Law Journal* and Chicago lawyer Gerald Skoning come a top 10 list of wackiest cases in employment law. On the list is a Chicago woman who claimed she was passed over for a promotion because of her disability: She claims to have a microchip embedded in her tooth that allows her to communicate with others. The EEOC launched an investigation of her claim. Also on the list is a man who was fired after bringing a gun to work. He said he was entitled to protection under the Americans with Disabilities Act because he is under psychiatric care. A judge gave him a jury trial.

This might make Skoning's list next year. Nyleen Mullaly has sued the Minnesota Army National Guard, claiming that its weight restrictions violate her rights because she has an eating disorder. Mullaly weighs 220 pounds. Regulations say she should weigh no more than 155.

In Houston, Judge J.R. Musslewhite has been reprimanded for fondling female prosecutors and for drinking the evidence in a drunken driving case. I smell another addition to Skoning's list.

In Mississippi, the state legislature has finally ratified the 13th Amendment and outlawed slavery.

HENRY PAYNE

This is how Amtrak President Thomas H. Downs began his first appearance before the new Republican-controlled Senate Committee on Commerce, Science, and Transportation, chaired by Larry Pressler of South Dakota. Downs: "I want to say how terribly sorry I am we don't have rail passenger service in North Dakota." Pressler: "South Dakota." Downs: "I'm one strike behind already."

Meanwhile, Pressler's Senate colleague Jesse Helms (R-N.C.) reportedly embarrassed staffers by referring to North Korean President Kim Jong Il as "Kim Jong Two" when reading from a prepared speech. To correct this mistake, in Helms's next speech the staffers helpfully spelled the name phonetically as Kim Jong Ill. Helms referred to him that time as Kim Jong the Third.

In Ventura, California, bookstore owner Ed Elrod put a sign on an easel in his store announcing that ACLU President Nadine Strossen would be appearing to promote her new book *Defending Pornography*. The city quickly slapped him with a fine for failing to get a permit to display a portable sign. Oddly, although the city has more than 400 complaints of such violations pending, Elrod went right to the top of the list.

Also in California, San Fernando Superior Court Judge John Farrell's two sons are members of the Boy Scouts. Farrell drives the troop on outings and has chaperoned them on hikes. He has come under criticism from other judges, who say that his behavior is unethical. Indeed, some of his fellow jurists have even suggested that he resign from the bench if he continues to help his sons this way. The Scouts, remember, exclude homosexuals, and critics, including many judges, say jurists should not be associated with organizations that discriminate on the basis of sexual orientation.

Mychael Ramsey, a 16-year-old from Kansas City, Missouri, rushed into a burning building and pulled out an 83-year-old woman and her 67-year-old brother, then went back in to get her retarded daughter. As a result of his actions, he had to spend several hours in the hospital recovering from smoke inhalation. Some people think that Ramsey is a hero. But not the Justice Department. The department has announced that it may keep a Young American Medal for Bravery that it was going to give him. The reason: Ramsey has since been busted for possession of marijuana.

In Nashville, Tennessee, two state law- makers have introduced legislation that would punish vandals, burglars, and flag burners with a caning on the courthouse steps. Said Republican Rep. Doug Gunnels: "I'm not an expert on crime. But people who are involved in more serious crimes usually start out with crimes like this." Yes, I believe that Ted Bundy got his start as a flag burner.

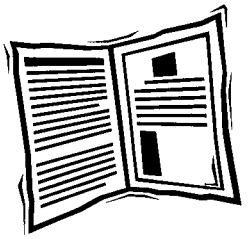
The Pakistani army gave its Swedish counterpart three thoroughbred geldings in a show of admiration. Unfortunately, Sweden bans the import of Asian horses because of fears of infection. Rather than offend the Pakistanis by returning the horses, the Swedes killed them. The Pakistanis were offended.

—Charles Oliver

Paper Losses

The high cost of mandatory recycling

By Ed Carson



THE OLD SAYING, "THAT'S NOT worth the paper it's printed on" has taken on a whole different meaning. Paper is suddenly worth a lot these days.

With the economy in high gear and no new capacity expected for the next several years, paper prices are rising dramatically. To some extent, this is a classic case of Adam Smith's invisible hand at work. But government's very visible hand also has played a role, imposing recycling mandates that have helped exacerbate the current paper shortage.

The price of newsprint is up 33 percent from February 1994, and more increases are expected to push that to 63 percent by May. Standard-grade magazine paper is rising by 10 percent a month. Northern Bleached Softwood Kraft, a paper grade used for cardboard and other products, which was selling for $400 per metric ton at the beginning of 1994, is now going for $825. So everyone who uses paper products heavily is affected.

Newsprint typically accounts for 20 percent of a newspaper's total costs, so the price hikes are hitting newspapers particularly hard. *The Wall Street Journal* raised its subscription price 10 percent and announced layoffs of more than 100 employees, citing newsprint price increases as one factor. *The New York Times* says it will raise its subscription price 13 percent because of "unprecedented" newsprint price increases. (Magazine paper accounts for about 10 percent of REASON's budget.)

In part, the price increases are due to the cyclical nature of the paper industry. When the economy is booming, paper usage goes way up, and so do the prices. When times are bad, prices plummet. Since it takes two to three years to add plant capacity, suppliers can't adjust quickly to changes in demand.

But another factor is the switch to recycled-paper production. "A lot of our new investment is going into deinking or recycling plants," says Barry Polsky of the American Forest & Paper Association, an industry trade association. So while overall capacity is expected to remain flat through 1997, recycled-newsprint capacity is projected to increase 26 percent.

And those investment decisions were not based solely on consumer demand. Twenty-eight states have approved either mandatory or "voluntary" recycled-content guidelines for newsprint, and more legislation seems likely.

The end result of this government intervention is that demand is outstripping supply, and that condition will continue for the foreseeable future. Industry sources estimate that $10 billion will be spent on new recycling and deinking equipment from now to the year 2000.

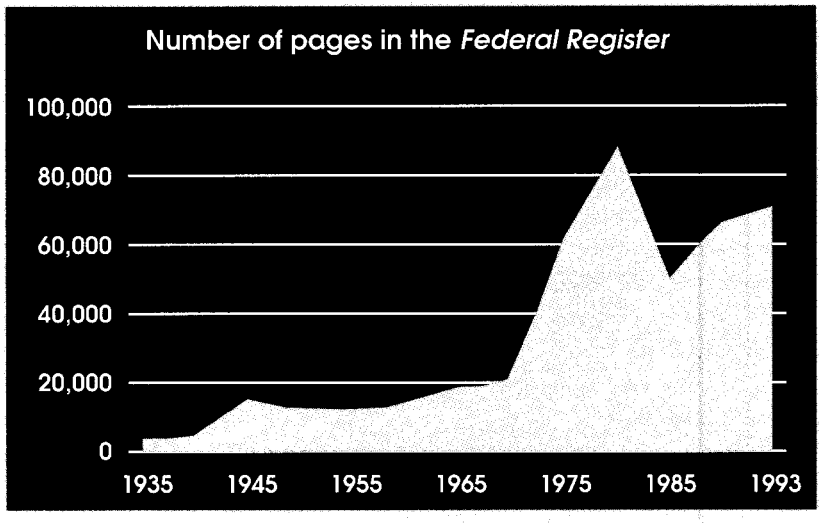
The Never-Ending Story

Can the feds really roll back regulations?

By Nick Gillespie

Earlier this year, the House voted to require federal agencies to conduct cost-benefit analyses before issuing new regulations. But can Congress actually cut federal regulations, which analysts estimate cost $430 billion a year? The record is not exactly promising. In 1935, the *Federal Register*, the volume that lists Washington's regulatory mandates, was a quick read at 4,000 pages. By 1980, the book of big government came in at an all-time high: 87,000 pages. Under Reagan, the *Register* slimmed to 48,000 pages in 1985, but then started bulking up again almost immediately. It currently stands at over 64,000 pages.

"If you stacked...each of the Federal Registers from the past twelve years on top of each other, you could build a tower...the height of the Washington Monument," writes the Cato Institute's Stephen Moore in *Government: America's #1 Growth Industry.*



Source: *Regulatory Perspectives*, Citizens for a Sound Economy, 1993.

Talking Takings

How much has to be taken to be a taking?

By Brian Doherty

ONE SMALL REFUSAL TO ACT BY THE federal government could be one giant leap for property owners bedeviled by federal regulations.

The U.S. House of Representatives in March passed a bill giving citizens standing to sue if federal action takes away more than 20 percent of their property's value. Perhaps it was recognition of a congressional groundswell against regulatory takings that made the feds decide, after 15 years of fighting, not to appeal the U.S. Circuit Court of Appeals for the Federal Circuit decision against them in *Loveladies Harbor v. United States.*

That decision gives the investors in the Loveladies Harbor development $2.6 million in damages because wetlands regulations forbade them to develop 12.5 acres out of their original 250-acre plot. Thus, the decision says that a taking can occur even if the property taken is part of a larger chunk. The decision sets a precedent for the U.S. Court of Federal Claims, and thus should have profound effects on the future of takings law.

Why would the feds bow out of a case whose precedent will doubtless work against them in future takings cases? Roger Pilon, director of the Cato Institute's Center for Constitutional Studies, speculates that they were afraid that the Supreme Court might end up agreeing with the lower court, and thus establish a binding precedent on all other circuits, not just the federal one.

In 1993's *Lucas* takings case, the Supreme Court seemed to hold that only a total taking needed to be reimbursed; in *Loveladies*, Pilon says, the federal appeals court held that "a taking is a total taking of whatever part is taken. If the courts had gotten it right from the start, with a zero-percent rule instead of a 100-percent rule, this issue would never have come up."

Nancie Marzulla, chief legal counsel for the Defenders of Property Rights, suggests that *Lucas* doesn't necessarily mean that anything less than a total taking is exempt from reimbursement. Since the facts of that case happened to involve a total taking, she says, the Supreme Court was restricted to judging only on that issue. That doesn't mean that anything less might not also be a taking.

Thus, she is optimistic about the possibility of future Supreme Court victories for reimbursing people who have *any* of their property's value taken by government action.

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Balance Sheet

By Rick Henderson

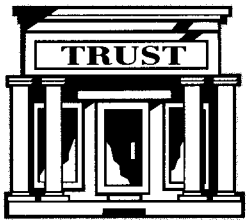
Assets

Apple Bites. New York Mayor Rudolph Giuliani sheds his squishy-moderate image and proposes the city spend $30.5 billion *less* in fiscal 1996 than it will this year. This 4-percent cut, the largest since the Great Depression, will hit schools, parks, sanitation, and welfare. Only the cops will get more money.

Weapons Check. The Virginia legislature ignores a personal, emotional appeal from the wheelchair-bound James Brady and votes to let law-abiding adults carry concealed weapons. Joining 13 other states with liberal "concealed-carry" laws, the legislature allows anyone who has a clean record, $35, and a photo ID to get a concealed-weapons permit.

Spanish Lessons. Mexico could learn plenty from Peru. The South American country has weathered 8,000-percent inflation, a four-year spell in which the economy shrank by 25 percent, and Shining Path terrorists to record 12-percent growth last year—the highest rate on the planet. One key to Peruvian success, reports *The New York Times*, is privatization. The government has raised $3.2 billion selling 49 state companies and plans to sell another 26, including steel mills, electric plants, mines, and the railroad.

Bank Note. Rejecting the American habit of bailing out corporations, financial institutions, and countries (remember Mexico?), British authorities let Barings bank go bust. By letting a 233-year-old institution fail, writes *Washington Post* columnist Jim Glassman, the Bank of England sent "a strong warning to other financial firms that it will punish poor judgment, poor management or even bad luck." Had U.S. officials eliminated deposit insurance when they deregulated savings and loans, the S&L disaster would have been a mere nuisance.

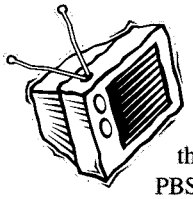


Liabilities

Labor Pains. The White House ratchets up the war against immigration—and business. The *Los Angeles Times* says President Clinton wants to hire 570 new INS and Labor Department investigators to harass and, in some cases, seize the assets of businesses suspected of hiring undocumented workers. Even California Gov. Pete Wilson's immigration adviser says Clinton's "employer vilification" goes too far.

Off Message. As the Senate considers reining in government—repealing the 1993 tax increases, curbing federal regulations, and repealing the assault-weapons ban—Judiciary Committee Chairman Orrin Hatch (R-Utah) says Congress should take on another regulatory crusade: Outlaw flag burning. On *Fox Morning News*, Hatch says he'll push a constitutional amendment to protect "our national symbol."

Time Tunnel. Economists Joel Kotlikoff of Boston University, Alan Auerbach of the University of California, and Jagadeesh Gokhale of the Cleveland Fed make a chilling prediction about the true cost of entitlements. They project that Social Security, Medicare, government pensions, and interest on the debt will require future generations to pay "net lifetime tax rates" of 84 percent. Good news, Gen Xers: The bills come due when the boomers retire.



Children's Hours. The Federal Communications Commission considers forcing television stations to carry a minimum number of hours of children's "educational" programming each week. While the FCC would let broadcasters pay other stations to fulfill part of the mandate, this bogus "market mechanism" looks more like a way for PBS affiliates to extort money from commercial broadcasters.

Heh. Heh. Work Is *Cool.*

Gen Xers are more positive about work than boomers.

By Ed Carson

SAY GOODBYE TO THE GENERATION X stereotype of suicidal, aimless whiners. The much-derided under-30 "slackers" are working and are positively...positive about their jobs, according to a new study by the Wyatt Co., a D.C.-based management consulting firm. It's baby boomers who think reality bites.

Wyatt polled 4,300 employees and discovered that workers under age 30 were more satisfied with their jobs than any other age group. In contrast, boomers, those 30–49 years old, were the most negative.

Among the findings, half of Xers say they are confident in their companies' management, versus 41 percent of boomers who say so. And 38 percent of younger workers say their companies promote the most competent employees. Just 23 percent of boomers agree.

Paul Sanchez, author of the Wyatt study, says that younger workers have a curious combination of cynicism and naiveté that makes them more likely to be satisfied. Sanchez suggests younger workers enter the work force with such low expectations that "job satisfaction almost comes as a surprise."

He also says that Xers haven't been working long enough to experience much turmoil in the workplace. Boomers, as a group, have witnessed more recessions, downsizings, and managerial incompetence and so are more apt to question company leadership and decisions.

But there are also strong reasons for Xers to be optimistic. In 1993, 47 percent of 18- to 24-year-olds had at least some higher education, compared to just 31 percent in 1980. And as the first generation to be fewer in number than the one before, they are likely to have greater opportunities for advancement.

Solving the Prisoners Dilemma

States use house arrest to open up prison beds.

By Ed Carson

IN A GROWING NUMBER OF STATES, IF you're caught breaking and entering or possessing illegal drugs, you may not be sent to prison. You might just be told to go to your room.

Faced with a rapidly growing prison population and budget shortfalls, several states are expanding community control programs for nonviolent offenders, hoping to lower costs, reduce recidivism, and free up prison beds for violent criminals. These programs vary widely in size and structure. But in general, community control programs divert some nonviolent offenders from prison and place them under house arrest and strict supervision for short sentences (18–30 months). Offenders may leave only for approved activities such as going to work, and they are subject to frequent visits from caseworkers, random drug and alcohol tests, and sometimes even electronic monitoring. They are often required to do community service, make restitution to victims, and pay part of the supervision fees.

Minnesota and Oregon both have extensive community control programs, but Florida has the largest such program of any state, with over 14,000 inmates currently in the Florida Community Control Program. In a 1991 study of the FCCP, the National Council on Crime and Delinquency determined that it cost the state $6.49 per day for FCCP offenders as opposed to $39.05 per day for comparable prison inmates.

In addition, the study found that offenders placed in the community control program had a lower new-conviction rate than similar offenders sentenced to prison. S. Christopher Baird, co-author of the study, says drug offenders placed in community control programs in Florida and other states do especially well. Unfortunately, he says, "Many states exclude drug offenders from their programs because of public intolerance of illegal drugs."

Ironically, the public's increasing intolerance toward crime may prod politicians to take advantage of community control programs. New York Gov. George Pataki recently announced a plan to repeal mandatory sentences for nonviolent drug offenders so that judges would have more discretion to sentence these convicts to treatment, community service, or house arrest—in effect, community control. But this would be a means to an end: Pataki said his proposal would open up 3,000–4,000 prison beds for violent offenders.

SOMETHING?

If you couldn't find our sold-out November issue on your newsstand, fear not. The following *Reason* back issues are available for $5.00 each.

■ **November 1994** ("Can the President Think?" by Edith Efron; Ron Unz on California's Prop. 187; Mike Godwin on cyberporn censors; Rick Henderson on the Entitlements Commission; Virginia Postrel on Cuban refugees, and more)

■ **December 1994** (Dave Barry interview; Wendy McElroy on the "feminist" attack on high-tech motherhood; special book section; the AIDS debate continues; Virginia Postrel on regulation, and more)

■ **January 1995** (Michael Fumento on the power-line scare; Mario Vargas Llosa in defense of Columbus; David Link on political storytelling; Thomas Hazlett on *The Bell Curve*; Virginia Postrel, Rick Henderson, and Carolyn Lochhead on the new Congress, and more)

■ **February 1995** (Special post-election section featuring John Hood, John Miller, Joel Kotkin, Peter Huber, Robert Poole, Rick Henderson, Michael McMenamin, and T.J. Rodgers; Thomas Hazlett on how the feds tried to stop cable TV; James Q. Wilson interview; Virginia Postrel on Bosnia, and more)

■ **March 1995** (Jeff Elliott on the DARE boondoggle; Rick Henderson on Congress's rising stars; Edith Efron responds to readers; James Heckman reviews *The Bell Curve*; Virginia Postrel on Newt Gingrich's futurism, and more)

Mail with your name, address, and payment of $5.00 per issue to: *Reason*, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034.

Barry Kaye: the force behind the $7 trillion Wealth Creation and Preservation Industry

At age 66, Barry Kaye is more passionate than ever about what he does. Appearing on national TV and speaking at over 110 seminars around the country each year, he shares his insightful and thought-provoking ideas about wealth creation and preservation with thousands of fascinated listeners. Yet he still calls himself an insurance salesman. Those attending one of his Wealth Creation and Preservation Seminars would probably call him an Evangelist! By Arlene Davidson

For years, Barry Kaye has stormed the country, giving as many as five 3-hour seminars in a week. Then back on a plane, he's off to the next city. Roaring at his audience, he tells them, "Use your intelligence and common sense. Use logic. Don't be a victim of conventional wisdom! Don't you understand, the more you have, the more your mistakes will cost you!"

Kaye convincingly conveys the concept that insurance can not only preserve worth, but increase it -- in part by keeping the tax collector's cut at a minimum. He makes it very clear that there is a way to pay Uncle Sam every cent of the estate taxes due and still leave their entire fortune to their families.

Someone asks, "How can you do that?" "I told you," he shouts, "Insurance is the most powerful tool you can use." He also tells them his concept is not for everyone. "If you've got to deprive yourself, forget it! Go have a good time! Let your kids worry about themselves. But if you've got 'junk money' (discretionary income you don't need for daily living expenses) sitting in the bank, that's your kids' legacy! That money can be working to create future generations of millionaires for your family."

Kaye claims his seminars are about estate tax cost discounting, not insurance. Insurance is simply the funding mechanism used to pay those taxes at a great discount. How safe is it? Very. He can't even cite an example of any insurance company that has not paid off. Calling his seminars to order in a booming voice, he commands, "Do I have your attention? I hope so, because with my *Die Rich and Tax Free System*, I can show you how to reduce your estate tax costs up to 90%, leverage your IRA or pension ten to twenty times and increase your $600,000 estate tax exemption up to $5 million! Are you interested?" They're interested!

Kaye has more energy than three 20-year-olds. And his enthusiasm and zeal are contagious. His children, Alan, Howard and Fern, who work at his side, share his passion for the family business -- and for The Wealth Creation and Preservation Industry.

Kaye tells those attending his dynamic seminars, "There are two things you can count on. You will die! And you will pay estate taxes! So what are you going to do about it? I say live well. And buy life insurance." He has protected his own fortune with $23 million in family policies. When he dies, he will leave his children and his grandchildren enough money to live well for the rest of their lives. As a matter of fact, he has created generations of multi-millionaires that have yet to be born.

According to the Bureau of Statistics, about $14 trillion will be transferred to heirs during the next twenty years, resulting in an estimated $7 trillion in estate taxes--the basis for today's incredible $7 trillion Wealth Creation and Preservation Industry. Although Kaye didn't realize the industry's full potential when he first began selling insurance, he always knew people would eventually understand that "as you cure your health with medicine, you preserve your wealth with insurance."

Barry Kaye -- a kid who grew up on the streets of New York, a former radio and TV announcer, life insurance salesman, best-selling author, financial authority and marketing wizard -- hardly realized he was creating a new industry. He recognized a need, used his marketing skills, and sold life insurance because he believed in its results. The rest is history in the making. ■

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Barry Kaye, founder of the Wealth Creation and Preservation Industry

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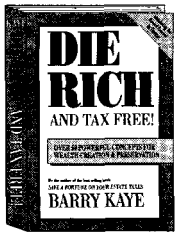

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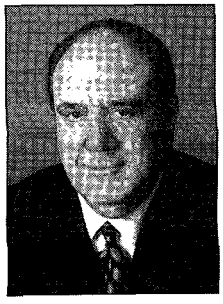

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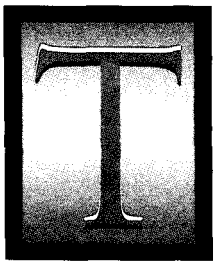
CLINICAL TRIALS

BEATING THE FDA IN COURT

BY ALEXANDER VOLOKH

HENRY PAYNE



hey say that whenever someone sued the FDA in the early '70s, Peter Barton Hutt, the FDA's chief counsel, would go into court and say, "The Food and Drug Administration is the expert scientific agency charged by the U.S. Congress and the president to protect the safety of pregnant women and small children." At that point, the case was effectively closed.

This story isn't true, but it might as well be. The FDA has been called "the agency that never loses." It almost never gets challenged, and when it does, it almost always wins. It's big. It's usually challenged on questions of fact and not on questions of law, which makes judges defer to it most of the time. It uses complicated words from science. It has the taxpayers paying its legal tab. It's going to be around for the rest of your company's life. And it never forgets.

There are two struggles going on for the soul of the FDA. The first is the debate over what the law should require the FDA to do, a debate that has intensified with Republican control of Congress. The FDA is consistently overconservative. It keeps life-saving drugs and medical devices out of the country and approves others only after interminable delays.

Tens of thousands of Americans die every year because they don't have access to the necessary medical technology. Consider the following estimates:

- Seven thousand people die every year because the FDA hasn't approved the Ambu CardioPump, a CPR device that is available in just about every other industrialized country.
- Nine hundred people die every year because the FDA hasn't approved the OmniCarbon heart valve, which also is in use just about everywhere else.
- From November 1988 to May 1992, about 3,500 kidney cancer patients died waiting for the FDA to approve the drug Interleukin-2, which was already available in France, Denmark, and seven other European countries.
- In 1988 alone, between 7,500 and 15,000 people died from gastric ulcers caused by aspirin and other nonsteroidal anti-inflammatory drugs, waiting for the FDA to approve misoprostol, which was already available in 43 countries.
- And 22,000 people died between 1985 and late 1987 waiting for streptokinase, the first drug that could be intravenously administered to reopen the blocked coronary arteries of heart-attack victims.

People may well come to the United States from other countries to take

advantage of advanced surgical techniques and avoid waiting lists, but when it comes to things under FDA jurisdiction, like drugs and devices, it's Americans who travel abroad. The FDA's caution and delays are also driving many companies to other countries. From 1992 to 1994, for example, Medtronic, a major medical-device manufacturer, moved 12 new businesses or new product lines to Europe, including its $40 million corporate ventures R&D group. And the *Irish Bio Tech News* reports that Ireland is now home to more than 40 expatriate American medical-device companies, employing 8,500 people, and that 10 more American companies are building facilities in Ireland.

The FDA's caution and delays are driving many companies to other countries. From 1992 to 1994, Medtronic, a major medical-device manufacturer, moved 12 new businesses or new product lines to Europe. The *Irish Bio Tech News* reports that Ireland is now home to more than 40 expatriate American medical-device companies, employing 8,500 people.

Forty-five percent of device manufacturers say they want to move abroad. Newt Gingrich has called the FDA the "number one job killer in America." Joel Nobel, president of ECRI, an independent medical-device testing company, predicted two years ago that "it is unlikely that it will take Congress and [FDA's Device Center] more than another five years to destroy much of the U.S. medical device industry." Since the Republican takeover of Congress promises tougher scrutiny of the agency, Nobel no longer urges device manufacturers to emigrate immediately. But he remains wary.

Nobel explains how Congress sets FDA medical-device policy: "The theoretical American patient, beloved by Congress and consumer advocates, that they wish to protect from an avaricious industry and uncaring health-care community is a wonderful abstraction beloved, as well, by the media. But real patients hurt, bleed, and die for many specific reasons, which manufacturers and the health community address in detail. Those details are not understood by Congress and the FDA, and political ideology keeps consumer advocates from seeing technical issues in perspective.

"To Congress we must say that our road to hell is paved with your good intentions and that we understand your formula. First, require that the FDA do the unwise or impossible. A few years later, ask the General Accounting Office to tell you if the FDA is doing the unwise or impossible as instructed. Express shock and surprise when you learn that it is not. Hold hearings to pistol-whip the FDA and industry in order to support the passage of more unwise or impossible-to-implement legislation. Do not forget to include testimony from patients whose demonstrable suffering can be attributed to the FDA and industry derelictions. Be sure to use a few exceptional industry sins to justify collective guilt and punishment. Never allow testimony by knowledgeable witnesses who may disagree with your preordained conclusions and already-written legislation, unless they represent industry and can be portrayed as self-serving and mercenary."

FDA partisans have a one-word answer to such criticisms: thalidomide. In the early 1960s, thousands of European babies whose mothers had taken the sedative thalidomide were born with birth defects. FDA enthusiasts claim that it was only thanks to Dr. Frances Kelsey of the FDA and her stubborn questioning that thalidomide stayed out of the United States. But what this really means is that the FDA was already powerful enough to stop potentially dangerous drugs. Since the thalidomide scare, however, FDA has grown more powerful—and more deadly.

In 1962, Congress passed the Kefauver-Harris Amendments to the Food, Drug, and Cosmetics Act, which required that the FDA test all drugs for efficacy, as well as safety, before approving them. In 1976, because of problems with the Dalkon Shield IUD, Congress passed the Medical Device Amendments. These effectively extended the same requirements to medical devices—a broad category covering everything from pacemakers to Band-Aids. In 1990, because of defective heart valves and controversy over silicone-gel breast implants, Congress passed the Safe Medical Devices Act, which further restricted medical devices. More legislation followed in 1992.

When a device or drug fails, an FDA regulator can count on hostile headlines, angry congressional hearings, and the threat of new legislation. But suppose a regulator is super-cautious and doesn't approve a life-saving device. What happens? Nothing. The heart-attack victims don't know that they could have been saved by streptokinase, and so the 22,000 deaths are invisible and safe. Sam Kazman, a public-interest attorney with the Competitive Enterprise Institute in Washington, dubs the problem "deadly overcaution" and calls the system "consistent with neither good government nor good science nor respect for individual liberty and dignity."

All this is, of course, disputed by FDA partisans. Fans of the FDA use two main arguments. The first goes something like this: "Those who claim that the FDA is doing a bad job take money from drug companies. Therefore, the FDA must be doing a good job." The second argument, recently made by Sidney Wolfe of Public Citizen Health Research Group, is that "the evidence for a lag in important drugs getting marketed here later than in other countries is extremely weak."

The first argument is stupid; the second is just wrong, and everyone in the drug and device industry knows it. Thankfully, these issues are now being discussed, after years of having been swept under the rug.

The second struggle for the soul of the FDA is waged in courtrooms by food and drug lawyers. Its goal is not to change

the law, but to stop the FDA from breaking it. And by making the agency's decision-making processes public, these lawsuits can expose the FDA's vindictive, sloppy, and overreaching procedures.

Since 1990, when David Kessler took over as FDA commissioner, enforcement has been one of the FDA's top priorities. In his first two months, Kessler added 100 new criminal investigators to his enforcement staff, many of them formerly with the Secret Service and the Drug Enforcement Administration. Armed raids on alternative health clinics and dietary supplement dealers followed, as well as increased warning letters, product seizures, and criminal prosecutions in the drug and device industries.

"We're getting new regulations out faster than ever before," Kessler boasted immediately after the 1992 elections. "We rely much less on voluntary agreements, and much more on court-enforceable consent decrees."

Unfortunately, the FDA isn't virtuously ensuring public safety in accordance with the law. "As with most administrative agencies," says Glenn Lammi of the Washington Legal Foundation, a D.C.-based public-interest litigation group, "the agency constantly attempts to expand its jurisdiction and power, straining against the limits the law places upon its actions."

In his 1994 book, *The FDA Follies*, Herbert Burkholz tells the story of what happened to Barr Laboratories during the generic drug scandal of the 1980s. Edwin Cohen, the president of Barr, testified before a congressional subcommittee in 1989 about the arbitrary and unfair treatment he had received at the hands of the FDA—"retroactive decision making, shifting standards, procedural and substantive leaks, favoritism by a reviewer, and high-handed and arrogant treatment by FDA officials." Within hours, FDA inspectors were swarming over Barr's facilities. Barr repeatedly sued the FDA for relief from harassment. The FDA said it wanted to close Barr down and assiduously tried to for the next three years. The company was deluged with minor inspection violations and delays in drug approval. Its share price fell from $37.50 to $6.00. It had to stop production on several product lines and lay off 25 percent of its employees. And in 1993, Edwin Cohen was replaced by someone whose mission was to make peace with the FDA.

The lesson of Barr Laboratories is simple. Says Burkholz: "In matters of compliance, the FDA is supreme. If the agency says that the floor of your plant is dirty, then you'd better grab a mop and a broom, even if you know that it's pristine clean, because no court in the country will take your side." Or, as Joel Nobel says, "You are not paranoid. They *are* really out to get you."

The generic drug scandal is over, but the FDA is still around. And, according to Glenn Lammi, so are reasons to sue.

➤ Under the Food, Drug, and Cosmetic Act, new drugs have to be approved or rejected within 180 days. So do "Class III" medical devices—the most heavily regulated devices, including pacemakers. But we should be so lucky. Pre-market approval requests for Class III devices take an average of 840 days (up from 337 in 1988), and new drug applications are running at two and a half years. One hundred eighty days used to be a mandatory deadline. Now, it's a discretionary "goal"—no thanks to Congress, which has never even commented on the change, much less authorized it.

➤ Since 1991, medical-device distributors have been required to register with the FDA. Before then, only those who "manufactured, prepared, propagated, compounded, or processed" drugs and devices had to register and were subject to "Good Manufacturing Practices" requirements and mandatory inspections. But in 1991, the FDA decided that even though distributors aren't listed, they propagate devices and so they should register too. According to Lammi, to "propagate," in this context, probably means to create drugs or devices for sale. If Congress had meant to "distribute" it they would have said so; it did after all, refer to distributors elsewhere in the act.

➤ In 1990, the FDA decided to regulate liquid chemical germicides that are used to clean medical devices and health care products. Not only did the FDA do this without public comment, but a lot of those germicides were already being regulated by the EPA as pesticides.

Then there are those FDA procedures that aren't illegal but really ought to be. If you make medical devices, the FDA can fine you $15,000 per violation of the law, up to a total of $1 million. "Per violation" means that if you made a mistake on your label and you shipped 70 devices with that label on it, you've violated the law 70 times, which means that you have to pay the full $1 million.

Another quirk of this rule is that the judge who figures out how much you owe works for the FDA. Whoops! There goes independent, objective adjudication. The judge's ruling can only be appealed to a federal court if the judge acted "arbitrarily and capriciously," which is a tough standard to meet; it goes without saying that rules like these give the FDA a lot of clout.

The results of all this? More paperwork, more delay, more lost profits and lost jobs, more companies moving offshore to escape FDA regulation—and more patients without medical care. And unless people challenge the FDA, it will continue to infringe the legal rights of the industries it regulates and deprive consumers of good, cheap foods and drugs.

Edwin Cohen, the president of Barr Laboratories, testified before a congressional subcommittee about the arbitrary treatment he had received at the hands of the FDA. Within hours, FDA inspectors were swarming over Barr's facilities. Barr repeatedly sued for relief from harassment. The FDA said it wanted to close Barr down and assiduously tried to for the next three years.

Every once in a while, people do fight back against the FDA. And every once in a longer while, some people win. The lesson from their experience is that given enough people with enough courage, money, and lawyers, the FDA can be kept in line and made to obey the law. At least for a time.

Take the case of R S Medical, makers of muscle stimulators called, appropriately, the RS-1 and the RS-2. R S Medical had been marketing the RS-1 and the RS-2 for five years, but when it made minor modifications to the products, the FDA tried to rescind its approval. R S Medical took the FDA to court; the agency agreed to let R S Medical continue marketing the products, as long as the company submitted another application.

It seems reasonable that the FDA would try to estimate the effect on the defibrillator market of shutting Laerdal down. Well, it did try. But its idea of an economic impact statement was a memo saying that someone at the FDA called up a broker friend to get a sense of the market, and that the broker said it wouldn't be much of a problem.

But this time, the company played a little prank on the FDA. It submitted the applications in January 1992 and hired a consulting company to submit the same applications under different names—the BTM-100 and the BTM-200. The first application was submitted in February 1992 and the second in March 1992. In April, the FDA found that the BTM-100 was substantially equivalent to other stimulators on the market and allowed the consulting firm to sell the product. It did the same for the BTM-200 in July.

R S Medical wasn't so lucky. Its review process lasted a full year, until January 1993. The reviewers asked a lot of technical questions; the company answered them. The FDA declared that the RS-1 and RS-2 were not substantially equivalent to other muscle stimulators—for reasons unrelated to their previous questions—and denied the applications.

Ordinarily, you don't want to punch the traffic cop in the nose, but R S Medical did, and the court found "glaring evidence of arbitrary action" in the FDA's different treatment of the two companies. It was found that R S Medical's applications were rerouted; instead of going to the reviewers that normally look at muscle stimulator applications, they went to the same people at the FDA who had originally wanted to rescind R S Medical's approvals. The FDA also had conducted an unscheduled inspection of R S Medical—according to the court, hoping "to uncover some deficiency which could affect the safety and effectiveness of the RS-1 and RS-2." The district court entered a permanent injunction against FDA in December 1993. R S Medical also benefited from the Equal Access to Justice Act; this law allows small companies who sue the government to get their attorneys' fees reimbursed. R S Medical was awarded nearly $400,000 in fees.

Laerdal is another one of the shining examples of a company that beat the FDA on its own ground. Laerdal makes automatic external defibrillators, which are used to restart stopped hearts. In early 1993, the FDA charged Laerdal with many violations of "Good Manufacturing Practices" (GMPs) and a number of paperwork violations. GMPs are a set of quality-control standards (such as rules about how to handle complaints and keep quality-assurance records) that companies have to abide by if they don't want the FDA to close them down. GMPs are, in general, a good idea, but conformity with GMPs is not the same as good product performance. As ECRI's Nobel puts it, "There is no known relationship between GMP paperwork and actual product performance in the field."

The FDA's solution was to close the company down until all GMP problems were resolved. Laerdal denied everything and challenged the FDA to prove the allegations. It said it was willing to make any changes in procedures that the FDA wanted. In an effort to accommodate the FDA, the company kept improving its systems and adding enhancements from the time the suit was filed until the time the trial started. But it staunchly refused to shut down.

The resulting trial lasted three weeks and revealed that while the FDA might be effective at regulation, it's lousy at litigation. It makes the kind of tactical blunders one might expect from an agency that isn't used to being under scrutiny.

The FDA routinely asks for exhaustive documentation on minute details of company procedures. But the FDA itself isn't prepared for similar probes. At the time of the trial, there were only three companies making automatic external defibrillators (AEDs). Each defibrillator is estimated to save one life per year. It seems reasonable that the FDA would at least try to estimate the effect on the AED market of shutting Laerdal down. Well, it did try. Its idea of an economic impact statement was a memo—one which obviously was never supposed to see the light of day—saying that someone at the FDA called up a broker friend to get a sense of the market, and that the broker said it wouldn't be much of a problem.

The FDA is also used to having internal, confidential discussions with its own in-house experts. Normally, it doesn't have to reveal anything that goes on in such discussions. The FDA's stock response to outside requests is, "File a Freedom of Information Act request"—and a lot of information isn't available through FOIA. But during lawsuits, whatever goes on in conversations with expert witnesses has to be made known to the other side. The FDA didn't count on that. In fact, in the Laerdal case, the FDA even withdrew one of its expert witnesses rather than submit the agency to such scrutiny.

The judge found that the FDA had failed to make its case. The FDA couldn't prove any of the GMP violations. Not one of them.

Not even for the procedures that Laerdal changed at the FDA's suggestion. Of all the paperwork violations, the judge found for the agency in only one case. That case is now under appeal by Laerdal. The FDA didn't even try to prove the charges. It expected the court to take its claims at face value.

The Laerdal case, one attorney told *The Food and Drug Letter*, an industry newsletter, makes clear that "the burden of proof is on the agency to demonstrate the existence of a violation for which the proposed remedy is appropriate....The agency took the approach of saying, 'We want you to show that you are in compliance,' instead of accepting the responsibility of demonstrating someone is out of compliance. They were saying, 'Would you kindly take a step into the quicksand we have ready for you here?' That is not acceptable."

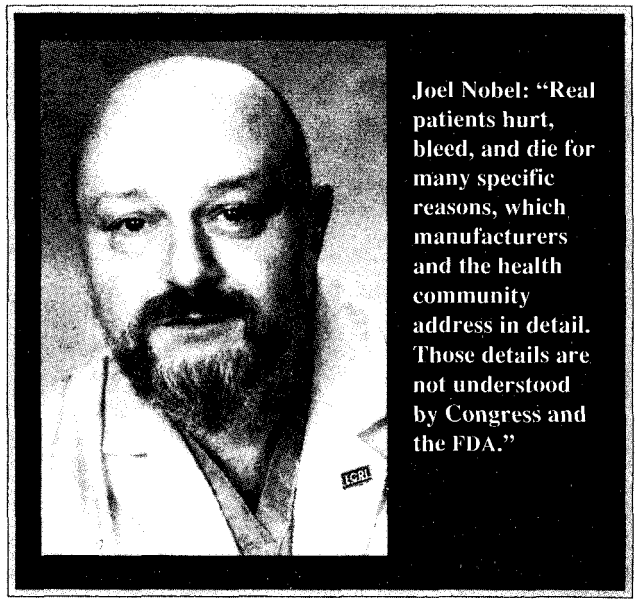
Usually, the FDA gets away with shifting the burden of proof, because companies are afraid to fight the agency. Says Larry Pilot, an attorney at the law firm McKenna & Cuneo, which represented Laerdal: "Lord, [some companies will] sign a consent decree before they get a single bit of information from the FDA. They don't know what the FDA has on them."

Perhaps the strangest thing about the Laerdal case is the FDA's reaction. The FDA Center for Devices and Radiological Health came out with a report on its "accomplishments" for 1994. Under "Enforcement": "In a contested court action against Laerdal Manufacturing, the District Court judge ruled in favor of FDA in finding the firm failed to properly meet its [paperwork] requirements." That's the one charge which wasn't thrown out, in a case where the FDA started out by claiming that the defibrillators were unsafe and killed people. The FDA didn't contest the decision. It filed an appeal, but later withdrew it.

Peter Barton Hutt, once the FDA's chief counsel, has become a vocal critic of the agency. But he is pessimistic about the odds of beating the FDA in court. Successful cases, says Hutt, are flukes. "The judicial system, no matter what people say, is a lottery. You get a good judge or a bad judge, a good jury or a bad jury—it's totally unpredictable, like Russian roulette. The variability of the judges is infinitely more important than the 'validity' of the case. All of these decisions are so ad hoc that for anyone to draw lessons from them is a terrible mistake."

Except, Hutt corrects himself, for the one large lesson: "The odds of prevailing against FDA are small. If you believe in engaging in the lottery, you might want to litigate against the FDA too."

And, says Hutt, the agency holds grudges. No matter what happens—whether it wins or loses—it never forgets who its enemies are. "If you lose, you have an angry FDA which is willing to slit your throat. When the FDA loses a case, it has a mind like an elephant. It's just something you've got to understand about the FDA. Once the agency makes a collective decision, trying to make it let go is almost impossible. These are 'FDA crusades.' In a real sense, they're vendettas. They started a war in 1920 with the dietary supplement industry, and it's not over yet. The FDA decided that cyclamate was dangerous in 1969. Everyone knows it's not dangerous, but they still don't have the political courage to say, 'We made an honest mistake in 1969.' The FDA is institutionally incapable of doing that."



Joel Nobel: "Real patients hurt, bleed, and die for many specific reasons, which manufacturers and the health community address in detail. Those details are not understood by Congress and the FDA."

Still, suits can be good for consumers and manufacturers, if not for the original plaintiffs. Prominent food and drug attorney Jerry Heckman, of Keller & Heckman, tells the story of a landmark food-packaging case that was handed down in 1979. Food packaging usually doesn't get as much press as drugs and devices, partly because the FDA is a lot less of a problem with food packaging. But why is that? Part of the answer may lie in the tale of *Monsanto v. Kennedy*.

Monsanto had an unbreakable bottle made out of a material with a long name straight out of science—an acrylonitrile styrene copolymer. This was considered an extremely good bottle, and it might well have captured the soft drink market. Unfortunately, some bad data came out on the toxicity of acrylonitrile. Not the plastic, mind you, but the material that was used to make the plastic. The FDA issued a press release, saying in effect that it had made a mistake in approving the bottle. Coca-Cola, which was going to market products in the bottle, withdrew from the deal they'd made.

Monsanto sued the FDA, and the FDA took the second. The second law of thermodynamics, that is, which says, among other things, that substances diffuse over time, and so acrylonitrile will eventually get into your Coke. This means, said the agency, that acrylonitrile is a "food additive" and should be regulated under the 1958 Food Additives Amendment to the Food, Drug, and Cosmetics Act. Well, yeah, said Monsanto, but there was so little acrylonitrile that it could never be a problem.

Judge Harold Leventhal, who heard the case, called the second law of thermodynamics "a paradigm of technical information well understood by all scientists and practically no persons of the culture of humanism and letters." The first law is that whenever you say "acrylonitrile styrene copolymer," a judge's eyes glaze over. But in this case, Monsanto won. The court told the FDA that second law or no second law, food and drug law didn't prohibit teensy-weensy amounts of chemicals. FDA had to go back and reconsider their position.

As we know, when the FDA loses, the company doesn't always win; it took the FDA five

years to reconsider. By then, the market for that plastic was gone in the U.S. because PET (that's "polyethylene terephthalate" for people of science) was now all the rage, though acrylonitrile is still being used for reusable bottles in Japan and Germany.

But *Monsanto* is a landmark case because it established that there's such a thing as a "reasonable expectation of no migration." In the decade following *Monsanto*, as analytical methods became more sensitive to minute quantities of chemicals, the FDA became more and more willing to say "this is so small that we don't care." In the end, both consumers and plastics companies came out ahead.

In 1993, the FDA came out with an official "threshold of regulation" policy for food packaging, which said the following: Suppose that your package contains a substance, but there's so little of it that it would only be one two-billionth of your diet. Or suppose that the substance is already regulated as a direct food additive, and your package would only add 1 percent of the recommended daily intake. Then, that substance is exempt from regulation as an indirect food additive. The 1993 thresholds of regulation were a large step for food packaging; Heckman, who represented Monsanto, calls them "unusually satisfying." And they wouldn't have been possible if Monsanto hadn't decided to sue the FDA.

In the final analysis, though, legal action is at best only a second-best solution. Even if all legal action were successful, all that lawsuits can do is make sure that the FDA follows the law. When the FDA does stupid things in violation of the law, litigation can keep it in line. But even if perfectly implemented, the law would give the FDA far too much power to restrict consumer choice and access to life-saving treatments.

The Laerdal case showed that if the FDA tries to shut a company down in an outrageous way, the FDA can be stopped. Shutting a company down in a run-of-the-mill way is still OK, though. Joel Nobel tells manufacturers: "If [the FDA Device Center] destroys a company and the livelihood of its employees, that is irrelevant to both the agency and Congress. The law does not require them to be concerned, and that argument, frequently made by industry, falls on deaf ears. Do not bother making it....The only way to get a response, either from Congress or the FDA, is to invoke public scorn, invective, ridicule, and sarcasm....I do not like this approach. It is rude and tasteless. But nothing else we have tried has ever worked. Lest you think this is a very private view, several [Device Center] insiders have confided to us that they think it is the *only* workable approach." One of the advantages of court cases is that, if properly publicized, they can evoke the appropriate scorn. But scorn is of limited value unless it leads to actual reform.

"The agency took the approach of saying, 'We want you to show that you are in compliance,' instead of accepting the responsibility of demonstrating someone is out of compliance. They were saying, 'Would you kindly take a step into the quicksand we have ready for you here?' That is not acceptable."

Reforming the FDA shouldn't be all that difficult. It's not as if we need to reinvent the wheel. Other countries have fine wheels already, and they roll more smoothly than ours. Here are a few examples from medical-device regulation.

In the United States, a device manufacturer has to send a pre-market notification to the FDA when it wants to market a new device. The pre-market notification, which the FDA quaintly calls a "510(k)," basically tells the FDA, "This device is substantially equivalent to a device that's already on the market, and I'm planning to market it in 90 days." (This system doesn't apply to the really risky devices, such as implantables.) Ninety days is the limit set by law, but the FDA stopped meeting that deadline in 1992. The average review time for a 510(k) is projected to exceed 300 days next year. Once upon a time, this would have been no problem, because when the 510(k) system was set up, you were free to market as long as the FDA didn't say no. But in 1990, the rules were changed; now, you can't market unless the FDA says yes. So despite the 90-day rule, review times have skyrocketed, companies have to wait unreasonably long times before they can market their products—and we don't even get a significant safety benefit out of it, since these aren't even risky devices.

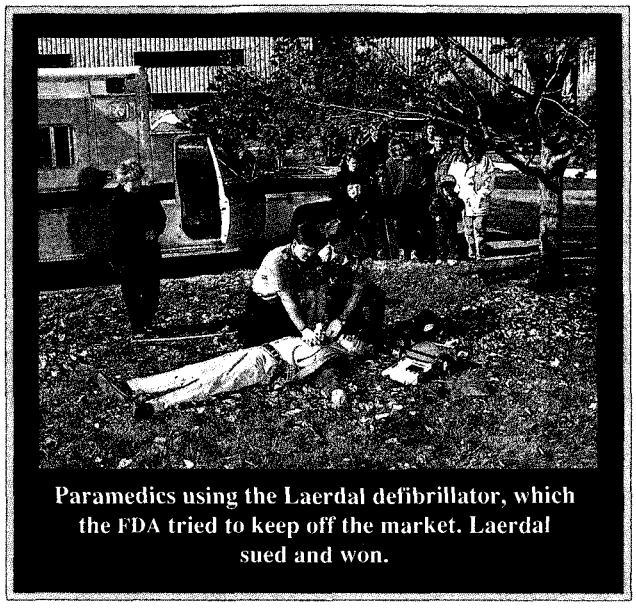
In Canada, on the other hand, there is no "pre-market notification" system. They've got "*post*-market notification." You have until 10 days after you begin marketing to submit your application to the Canadian equivalent of the FDA. And they can't stop you unless they find something wrong with your product. The threat of having one's product pulled from the shelves is enough to keep device manufacturers in line—but the innocent, small device manufacturers can still get their products out.

There's another interesting thing about Canada—you can export from there. In the United States, the FDA has to grant an export license for you to be able to sell to another country—even if the other country has already approved your device. It gets even worse: In one recent case of regulatory imperialism, the FDA tried to seize "adulterated" mushrooms that hadn't cleared customs yet. Normally, when goods haven't cleared customs, the importer has the right to reexport them, whether or not they're misbranded. But an FDA district director said, "Where we believe there is a potential hazard to health, we don't want this stuff going anywhere." A federal judge in New Orleans nipped that one in the bud, though the FDA wants the case reconsidered.

Paul Geyer, a Canadian medical-device manufacturer, tells people to set up shop in Canada because "if the FDA walks into your place and says, 'We're shutting you down for X, Y, and Z reason,' you can't do any-

thing; you can't ship to Europe; you're dead." If you're in Canada, the FDA can stop you from selling in the United States, but at least it can't stop you from selling elsewhere.

One of the main barriers to medical-device innovation in the United States is slow and unpredictable regulatory treatment. In Europe, things are faster, clearer, and more efficient. Medical devices have to abide by certain known, definite standards, which are based on the standards and practices of the industry. This is in contrast to the U.S. system, where companies have to abide by "Good Manufacturing Practices," which are made up by the FDA and subject to interpretation by the inspector. In Europe, if you conform to all of the standards, you can get a "CE" (Certified Europe) mark from any of a number of private or quasi-private certifying organizations called "notified bodies." Each country can designate its own notified bodies, such as the British Standards Institute. The European system has two distinct advantages. First, device manufacturers aren't subject to the whims of overzealous inspectors. And second, things go faster and more smoothly because "approvals" are handled by what are essentially *competing* FDAs.



Paramedics using the Laerdal defibrillator, which the FDA tried to keep off the market. Laerdal sued and won.

The most important thing to do is to end the FDA's monopoly in drug and device approval. The FDA should keep reviewing drugs and devices (preferably farming the job out to these private certifying bodies), but only in an advisory capacity. Unapproved drugs and devices could carry warnings—a metaphorical skull-and-crossbones—but the final choice should be left to hospitals, doctors, and patients. Doctors, whose reputations and incomes are on the line, would still have an incentive to act responsibly, and so unapproved drugs and devices wouldn't be widely used—but they would be available for those in need.

Humorist Dave Barry tells the true story of the time federal law enforcement authorities cracked down on a shipment of frozen scallops. In October 1994, the marshal's office in Norfolk, Virginia, was ordered to arrest more than 6,400 pounds of sea scallops. Their offense? Containing between 85 percent and 87 percent water. Interim water content guidelines set by the FDA and the scallop industry set the maximum water content at 84 percent. On September 6, the U.S. attorney's office filed a civil lawsuit against the scallops in the U.S. District Court in Newport News, Virginia. The lawsuit's name: *U.S.A. v. 268 Cases, More or Less, of an Article of Food.* As Barry might say, I swear I am not making this up.

Due to their spineless nature ("as members of the deceased mollusk family," as Barry put it), the scallops chose not to challenge the FDA. But are we men or scallops?

Not that the FDA should be challenged lightly. As *The Food & Drug Letter* notes, "Dealing with FDA is a study in boundary recognition: knowing when to advance, when to retreat, when to confront, when to tug the forelock." Tommy Thompson, chairman of the Medical Device Manufacturers' Association, warns, "Don't get the idea that we want to be belligerent. We say 'Yessir' just like anybody else." But as David Link, who was the first head of the FDA's Bureau of Medical Devices, reminds us: "You do not want to throw things back in FDA's face, but you do not want to get screwed, either."

There has probably never been as much hope of reforming the FDA as there is during this Congress. But the hopes of reformers have been dashed before. At a recent medical-device convention in Anaheim, California, "How to live with the FDA" and "How to leave the FDA" were the dominant themes. FDA representatives and other experts went into excruciating detail about how to prepare a 510(k), what exactly GMPs are, how to prepare for an inspection, why you should do exactly what the inspector says, and so on. Meanwhile, one session was entirely devoted to why manufacturers should emigrate to escape the clutches of the FDA and where they should go.

As for prospects of reform, FDA experts don't seem to be holding their breath. Commissioner Kessler may be the most popular government employee in Washington today, says writer James Dickinson of *Medical Device & Diagnostic Industry.* The naked truth may be that the American people want the FDA because they're scared of things they can see. Thalidomide babies are visible and make headlines, and people want to avoid that. Heart-disease patients who die because a drug wasn't available yet—these people, though more numerous, are invisible, and so people aren't too concerned with that. And people are still more comfortable with thinking of food and drug corporations as the enemy. The folks at the FDA are from the government; they're here to help us.

So the American people may be of limited help. And firms that appease the FDA, says one food and drug attorney, are only "nourishing the monster....Most companies do not want to fight the agency, even if they have a defensible position. By their reluctance to challenge, they are encouraging FDA to trample their rights. This will continue until some David decides that, if Goliath is going to kick his ass, he is going to have to do it."

Which means that for now, our best hope may be that in this litigious society, someone, somewhere, will decide to sue.

Alexander Volokh is an assistant policy analyst at the Reason Foundation.

LAERDAL MEDICAL

LICENSED TO
ELECTRONIC REPRODUCTION PROHIBITED

A VIAL CRIME

Meet Sam Zhadanov, 68-year-old plastic molder and drug-war casualty.

By Jacob Sullum

On Monday, January 16, Sam Zhadanov reported to the Allenwood Federal Prison Camp in Montgomery, Pennsylvania, to begin serving a five-year sentence for money laundering, conspiracy to sell drug paraphernalia, and conspiracy to aid and abet the distribution of crack cocaine. Given the charges, he could have received a sentence of 14 years to life. But because he pleaded guilty and let the government take his assets, the prosecution certified that he had been cooperative and was therefore eligible for a "downward departure" from the mandatory minimum sentence. In a sense, then, he is lucky.

But Sam Zhadanov, a 68-year-old engineer who emigrated from Russia in 1973, does not feel lucky. An inventor who holds patents in Russia and the United States, he feels the government has robbed him of his last productive years, not to mention the fruits of his hard work during the two decades since he came to America with his wife and son.

Starting out as a machinist with a few hundred dollars to his name, Zhadanov built a successful plastic-molding business, Vortex Products, which the government would later falsely depict as a shady, fly-by-night operation devoted to serving crack dealers. At first Vortex manufactured Zhadanov's inventions, such as a shower massage and a portable dishwasher. Later it also made items to order for various businesses, including toy, computer, and medical-supply companies. Eschewing vacations, fancy cars, and luxury homes, Zhadanov never had much use for the money he made, except to reinvest it in the business.

Longtime friends report that Zhadanov was always quick to help fellow immigrants, even while he and his family were still struggling. Eight of them told the court that sentenced him: "Sam helped more than 30 Russian immigrants to start their lives in the United States. He shared his apartment, food, and everything he had with many of us when we came here. It was not because he had extra (he barely had enough for his family) but because we needed it. Sam helped us to find work, move to a new home, buy the first car. Most importantly, he was always there for us and gave us tremendous energy and moral support....We know Sam as a person of rare kindness, exceptional honesty, and uncompromising integrity."

Vitaly Rogalsky, a professor at Mt. Sinai Medical Center, told the court he had sought Zhadanov's help in developing a device to increase the efficiency of bottles used to grow cell cultures. Zhadanov created the prototype for free, without a written agreement. "Mr. Zhadanov struck me as...a true enthusiast absolutely devoted to progress in medicine," Rogalsky wrote, noting that Zhadanov had later invented a new kind of safety syringe designed to prevent the spread of disease. "It is absolutely clear that Sam is an important contributor to our society and deserves to be treated as such."

Even after he officially retired and stopped taking a salary from Vortex, Zhadanov continued to work long hours at the factory. "What will I do for five years?" he asks, reflecting on his prison sentence. "I need my work. Taking away my equipment is like taking away my hands."

Zhadanov, who has never had trouble with the law before, is bewildered by the concepts of drug paraphernalia, money laundering, and conspiracy, which can turn business transactions into felonies. "What crime have I committed, that I should go to jail for five years?" he asks. "I made a mistake. Why do you give for a mistake five years in prison?"

Zhadanov's mistake was to manufacture little plastic containers, about an inch long and the width of a pencil, similar to the ones fancy stores use for perfume samples. These containers are also used by drug dealers to hold small nuggets of crack cocaine (half a gram or so). They are perfectly legal when intended for a legitimate purpose. But when they are intended for packaging crack, they are considered drug paraphernalia. As far as Sam Zhadanov was concerned, he made perfume sample bottles. According to the government, he made crack vials.

The entire case against Zhadanov rests on this distinction. The government does not allege that he or any of the other defendants in the case ever saw any crack, let alone sold it. "There's not a single drug dealer anywhere," says Eli Zhadanov, Sam's son. "This case does not have one ounce of drugs or one name of a drug dealer—or a drug user, for that matter. Not one."

Sam Zhadanov's story shows how the drug laws have expanded to cover behavior increasingly remote from drug dealing. Because crack is illegal, so are the containers that carry it. The money used to buy the containers is tainted, and so is the business that accepts it. In this way a decent, productive, conscientious man can lose his freedom and everything he owns, even though his arrest and imprisonment cannot possibly have an impact on the drug trade.

In effect, the federal law against drug paraphernalia punishes the crime of thinking the wrong thought while doing something—in this case, making plastic containers—that is otherwise permitted. Legally, the issue is straightforward: What did Sam Zhadanov know, and when did he know it? But we should not lose sight of the moral issue: Whatever was going on in his mind—and no one but Zhadanov can ever know that for sure—is it right to put a man in prison for making little plastic containers? The question should give pause to supporters of drug prohibition.

The prosecutors conceded that Zhadanov initially did not know that the containers had anything to do with drugs. But they argued that he must have soon realized he was manufacturing an illegal product, given the suspicious behavior of his customers. It does seem that Zhadanov was oddly naive and incurious about the ultimate use of the containers, and he says he regrets that he was not more inquisitive.

Yet Zhadanov's behavior is not surprising given his personality. A slight, thin man with short, gray hair and metal-framed glasses, Zhadanov gets excited about a better way to make a plastic toothpick. He has a heavy Russian accent, and his command of English is spotty, but when he talks about his work, the words flow and he gestures enthusiastically. When the conversation turns to financial or legal matters, he consults his wife, Anna, an engineer who served as Vortex's bookkeeper, for details.

"When he touches a new object," Eli Zhadanov says of his father, "he starts turning and twisting it to see how it is made and how it works. He observes the world around him in terms of building blocks and working mechanisms....Whether [customers] introduce the product as a 'safety syringe' or a 'perfume sample,' he treats them all in terms of cavities, runners, and pins." After finding the most efficient way to manufacture a product, designing the necessary molds, and setting up the manufacturing process, Zhadanov would move on to the next challenge. He was not very interested in production once it became routine, let alone in what happened to the product after it left the factory.

"For me, this was a legal job," Zhadanov says of the work order that led to his imprisonment. "I never imagined that I had to be responsible for it. I am a custom molder. I never knew that plastic could be illegal."

This was Zhadanov's attitude in the summer of 1990, when

The product that sent plastic manufacturer Sam Zhadanov to prison and lost him his business and savings—tiny plastic vials suitable for perfume samples.

he got a call from an engineer he had known in Russia. The acquaintance said his son-in-law, Henry Belkin, and Belkin's partner, Leonard Edelson, had an item they wanted to manufacture. Zhadanov agreed to meet with them at his Metuchen, New Jersey, factory. They brought samples of cylindrical, clear plastic containers with colored tops, which they said were used for perfume. Each of them owned an electronics and general-merchandise store in Philadelphia, and they had found that the containers were very popular. They had decided to become wholesalers and were looking for a manufacturer who could make the containers cheaply enough. Zhadanov agreed to study the problem and eventually told them Vortex could do the job. Belkin and Edelson hired him, and by January 1991 Vortex was producing the containers on a regular basis.

Under instructions from Belkin and Edelson, Vortex packed the containers in clear plastic bags bearing the image of a partially unpeeled banana and the phrases "FOR PERFUME SAMPLE USE ONLY" and "MADE IN TAIWAN." (Belkin and Edelson said they were copying a product made in Taiwan, and they later told Zhadanov they did not want competitors to know the location of his factory.) The instructions read: "FILL UP THE BOTTOM PART WITH SCENTED OIL OR PERFUME. USE THE SCREW-ON TOP AS A TESTER." Belkin and Edelson wanted to pay for the containers in cash, but Zhadanov insisted on checks. The two businessmen formed a trading company called Tri-State General and paid Vortex out of its account. But they were chronically behind on payments, and Zhadanov says he felt compelled to accept cash in addition to the checks. He had the impression that Belkin and Edelson were trying to use up unreported income from their stores.

Although a chart accompanying a recent *Wall Street Journal* article on "Russian organized crime" alludes to their operation, the fact that Belkin and Edelson would agree to pay for the containers even partly by check suggests that they were not exactly professional criminals. Similarly, an incident that occurred soon

PHOTOS: MICHELLE SULLUM

after Vortex started making the containers indicates a lack of savvy in dealing with the police. On February 6, 1991, Edelson was driving a rented van loaded with the containers on the New Jersey Turnpike when he was pulled over by state police for changing lanes without signaling. Edelson and his passenger, an employee named Zachria Gispan, seemed nervous, and their stories about the cargo were inconsistent. So the troopers asked Edelson for permission to search the van, which he granted—an odd decision for an experienced criminal. "Through my training and experience I immediately identified the items as 'crack' vials," one of the troopers later reported. He and his partner arrested Edelson and Gispan for possession of drug paraphernalia with intent to deliver. They pleaded guilty and were sentenced to probation. Edelson and Belkin concealed the incident from Zhadanov, afraid that he would stop producing the containers.

It may have been obvious to the state trooper that Edelson's cargo was illegal, but it appears that not all of New Jersey's police officers were up to speed on the state's drug-paraphernalia law. On May 9, 1991, the Metuchen Police Department received a phone call from someone who reported that crack vials were being manufactured at Vortex. The police declined to investigate. Today Sam Zhadanov wants to know why he is being punished for a crime the local police didn't even consider worth looking into.

The event that ultimately led to the downfall of what investigators dubbed the Belkin Crack Vial Organization occurred that same month in Pennsylvania. State law-enforcement agents raided two general-merchandise stores in Philadelphia that, like many other stores in Philadelphia and New York, openly sold the plastic containers. The owner of the stores, Roni Moshe, was Belkin and Edelson's biggest customer. Facing the threat of a stiff prison sentence, Moshe agreed to help build a case against Belkin, Edelson, and their associates by continuing to purchase their containers and secretly recording conversations with them.

The government claimed that, following the raids on Moshe's stores, Zhadanov must have known that he was engaging in illegal activity, since "Belkin and Edelson told Zhadanov what had happened." But this doesn't make sense: Moshe could not have informed Belkin and Edelson that he had been arrested on drug-paraphernalia charges without blowing his assignment as an informant. Judging by a recorded conversation that Moshe had with Belkin and Edelson on July 18, 1991, his cover story was that he had gotten into trouble with the Internal Revenue Service.

During the conversation, the three men discuss accounting procedures and mention the seizure of money and financial records. Belkin says: "You didn't learn yet how to do it.... You've been in business for two years....You have to speak the truth: 'I'm sorry. I didn't know. You got all my money now. Take the taxes, take everything.' " Assistant U.S. Attorney Paul Gray, the lead prosecutor in the case, concedes that Moshe did not tell Belkin and Edelson the whole truth about the raids. "He said stuff like, 'Yeah, I had a tax problem,' " Gray says.

The Zhadanovs say Belkin and Edelson told them they had disbanded Tri-State General because of its close association with Roni Moshe. Since this meant Belkin and Edelson would no longer pay by check, Sam Zhadanov decided to drop the job. But Alex Srebrianski, a former Russian dissident whom Zhadanov employed as a plant manager, proposed leasing the necessary equipment from Vortex and taking on the job himself. He said he had become comfortable with Belkin and Edelson while overseeing production of the plastic containers, and he had no problem taking cash from them. Zhadanov agreed to this new arrangement, and on July 10, 1991, he and Srebrianski signed a lease agreement for the equipment.

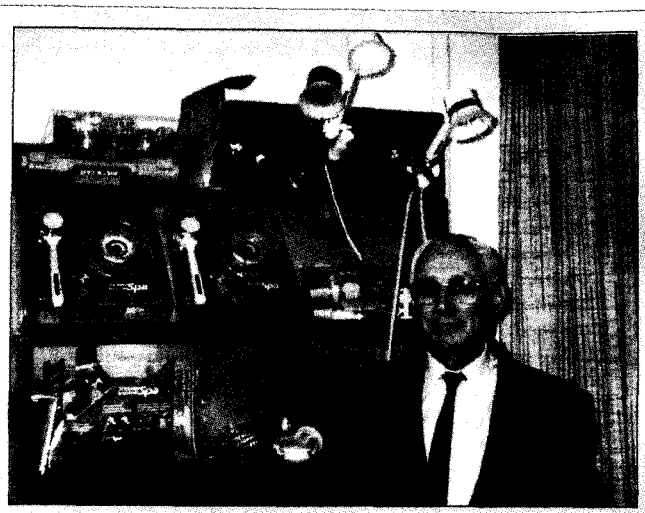
Srebrianski paid $8,000 a month for the equipment with checks drawn on the account of his U.S. Alexander Trading Company. Since he did not have enough regular work to hire full-time employees, the Zhadanovs say, he continued using Vortex employees, and since he had trouble getting credit, he obtained his supplies through Vortex as well. He reimbursed Vortex for these expenses in cash.

In September 1991 Pennsylvania drug agents found a scrap of paper outside a storage locker used by Belkin and Edelson. On the paper was the logo of D-M-E, the company that had produced the molds that Vortex used to make the plastic containers. Through D-M-E, the agents identified Vortex and, together with the U.S. Drug Enforcement Administration, started to watch the factory. "The government for two years was watching our factory, and they say in their reports that everything was open," says Anna Zhadanov. "If you want to hide something, you don't leave the door open....They knew that we didn't know. They never came to us....When we asked an agent why they did this, he said, 'We wanted to find drugs.' For two years they waited for drug dealers, and they do not have any."

The Zhadanovs say they became suspicious when Belkin and Edelson started using transfer locations instead of picking the containers up at Vortex. In late 1991, the Zhadanovs asked Belkin and Edelson what was going on. This was the first time, the Zhadanovs say, that they learned the containers could be used for drugs. But they say Belkin and Edelson assured them that it was legal to make and sell the product.

Indeed, a conversation recorded on October 23, 1991, sug-

As far as Sam Zhadanov was concerned, he made perfume sample bottles. According to the government, he made crack vials. The government does not allege that he or any of the other defendants in the case ever saw any crack, let alone sold it. "For me, this was a legal job," Zhadanov says of the work order that led to his imprisonment. "I never imagined that I had to be responsible for it. I am a custom molder. I never knew that plastic could be illegal."



Sam Zhadanov, plastic-products manufacturer, surrounded by some of the (legal) wares he designed and made.

gests that, despite Edelson's arrest, he and Belkin were confused about the meaning of state and federal paraphernalia laws. Roni Moshe's sister, Sigy, asks Belkin, "Is there a law against it?"

He replies: "You know, with the law is. You coming from an interstate, you know, from one state to the next....That's where they were coming, from Pennsylvania to New York back in Jersey."

Sigy Moshe presses him: "But I'm talking about, is there any law against it? To sell it?"

Her brother, Roni, interjects, "No paraphernalia."

Belkin says, "I don't know. Is there a law?"

Roni Moshe again interjects, "That's a container to contain."

Belkin concludes, "To sell it maybe there is no law, but to take it on the road..."

In any event, Sam Zhadanov assumed that he could not be held responsible for the ultimate use of a product made in his factory. Production continued until May 1992, when Zhadanov observed a man in a car taking photographs of the factory. When he told Belkin about the incident, Belkin said the man might be a police officer, or he might have been sent by a competing manufacturer. Alarmed, Zhadanov ordered a halt to production and consulted an attorney about the legality of the operation. After researching the relevant New Jersey statutes and case law, the attorney, Martin A. Spritzer of Edison, New Jersey, wrote Zhadanov a letter on May 21, 1992:

"You have asked for an interpretation as to whether you could be responsible for the manufacturing and distribution of certain items which are being manufactured on your premises by another person to whom you have leased certain machines and molds in the event such product is used in connection with unlawful drug distribution....It is my opinion that the...containers that you showed me, together with the description of how they emanate from your building, should not make you liable....First of all, you are not distributing, processing, or manufacturing the container. The person to whom you leased the molds and machinery is doing that. Secondly, you have no knowledge of how these containers are being used." (By this he meant that Zhadanov did not know for sure that drug dealers were buying the containers.)

Meanwhile, Srebrianski tried unsuccessfully to set up his own factory and continue the operation there. In June 1992, he approached Zhadanov about resuming production at Vortex. Reassured by the attorney's letter, Zhadanov agreed. At this point, Belkin and Edelson changed the way the money was handled. Previously, one of their distributors would collect receipts from the stores and give the money to Belkin and Edelson, who would give Srebrianski his share; then Srebrianski would pay Vortex. Now Belkin and Edelson decided that the distributor should give the money directly to Srebrianski, who would divide it among himself, Vortex, and Belkin and Edelson. Because of this change, the Zhadanovs say, they discovered that Belkin and Edelson were selling the containers for about $850 a case after paying Vortex just $200. So Sam Zhadanov insisted on a $50 price increase, to be split evenly between Srebrianski and Vortex.

Production continued for nearly a year. On the morning of May 19, 1993, state and federal agents banged on the door of Sam and Anna Zhadanov's two-bedroom apartment in Brooklyn. When the Zhadanovs opened the door, the agents tackled Sam (the government says he was "placed on the floor"). "They knocked me down on the floor in my underwear," recalls Zhadanov, who stands five feet, four inches tall and weighs about 135 pounds. "Eight people, big like that. And I am a small old man. They scared me so much, I was close to a heart attack. With guns, they come at 6 o'clock in the morning."

Although they did not have a search warrant, the agents looked through the apartment, ostensibly doing a "security sweep," and discovered a safe in the bedroom. Anna Zhadanov says one of the agents ordered her to open it (the government says he simply "asked" her to do so). The safe contained several shoe boxes, which the agent asked her to open. She refused and closed the safe. The agents later obtained a search warrant and seized about $800,000 in cash from the safe.

Eli Zhadanov notes that his parents come from a culture where there is nothing inherently suspicious about keeping large amounts of cash. The Zhadanovs say about $200,000 of the money belonged to relatives. The balance came from the cash payments that Vortex received from Srebrianski and from Belkin and Edelson over the course of two-and-a-half years. But the Zhadanovs say less than half of that, about $280,000, represents profit. Sam Zhadanov covered expenses for the Belkin and Edelson job with money from other customers that he deposited in Vortex's bank account.

Zhadanov says he did not deposit the cash in the bank because he was afraid it would raise questions about the source, and Belkin and Edelson did not want to be named. Instead, he planned to spend the money on new equipment that he would need to make plastic Scrabble pieces for Milton Bradley. (The Zhadanovs have the prototype for the game pieces and price quotations for the equipment.) Since he intended to reinvest the money in his business, he did not consider it unreported income. The IRS, of course, has a different view, though the agency chose not to bring criminal charges.

In addition to the money from the safe, the government seized the Zhadanovs' personal bank accounts, Vortex's bank account, the factory, the equipment, and the land on which it was located—$1.5 million to $2 million in assets. The government argued that all of this property either represented the proceeds of illegal activity or helped facilitate illegal activity. If drug dealers sold crack and used the proceeds to buy vials from retailers, who paid Belkin and Edelson, who paid Srebrianski, who then paid Vortex, this money then contaminated any bank accounts into which it was deposited. Furthermore, all of the assets associated with Vortex can be said to have facilitated the production of the vials (thereby facilitating the distribution of crack) or to have helped launder the proceeds of illegal activity.

Thus, in the government's view, everything the Zhadanovs had achieved was tainted by the order from Belkin and Edelson. Indeed, in testimony before a federal grand jury in Philadelphia, a DEA agent suggested that Vortex had been established to serve the needs of crack dealers. On November 12, 1992, DEA Special Agent Ellis Hershowitz testified: "This company [Vortex]—our indications of it, it hasn't been in operation all that long. As of the time of the interview, they were just ordering equipment in the early part of '91 through D-M-E Corporation. And it's our understanding that they were just getting started out then. Our impression is that they went into business for the purpose of manufacturing these vials because they knew they could make a lot of money doing it."

A juror asked, "They didn't make anything else, just the vials?"

Hershowitz answered, "Back then they didn't make anything else."

In fact, Vortex had been in business since 1981 and had been making items to order since 1987; its customers included Drexel University, Milton Bradley, Shenley Distillers, and Computer Insights. During the period that Vortex was producing plastic containers for Belkin and Edelson, its main customer was the medical-supply company Becton-Dickinson, for which it made a safety syringe that Zhadanov had invented.

After Zhadanov's arrest, federal agents began contacting his customers, informing them of the charges against him. Becton-Dickinson terminated its relationship with Vortex. A deal with Hammacher Schlemmer, which had planned to carry Zhadanov's shower attachment, fell through. Zhadanov received an anxious letter from a Russian businessman who had ordered 10,000 shower attachments from Vortex. "I am alarmed by the extent of your legal problems," he wrote. "The cause of my concern is a most unpleasant phone call that I received last night at my residence from [a] U.S. government agent....For now I will keep my obligations, but if they continue to harass me, I will have no alternative but to cancel the order." In this manner, the government undermined what was left of Zhadanov's business.

The government seized the Zhadanovs' personal bank accounts, Vortex's bank account, the factory, the equipment, and the land on which it was located. The government argued that this property represented the proceeds of illegal activity or helped facilitate illegal activity. If drug dealers sold crack and used the proceeds to buy vials from retailers, who paid Belkin and Edelson, who paid Srebrianski, who then paid Vortex, this money contaminated any bank accounts into which it was deposited.

The charges against Zhadanov were certainly alarming. The government estimated that Vortex produced more than 200 million vials, each of which might ultimately contain at least half a gram of crack. Hence Zhadanov was charged with participating in a conspiracy to distribute 10,000 kilograms of crack. He was also charged with 69 money-laundering counts, based mostly on the checks that he received from Belkin and Edelson and from Srebrianski, which he deposited in Vortex's bank account. Although this might seem like a pretty inept way to launder money, since it left a clear paper trail, the government argued that a financial transaction can be considered money laundering even when it could not realistically be expected to hide the proceeds of illegal activity.

Zhadanov was initially determined to go to trial, since he felt he had done nothing wrong. But under pressure from the prosecutors, who he feared might bring charges against his wife, and at the urging of his attorney, Peter Ginsberg, who said it was the best way to avoid a long prison term, Zhadanov signed a plea agreement in December 1993. He pleaded guilty to the conspiracy charges and to most of the money-laundering counts. He agreed to give up all of his assets, except for half of the proceeds from the sale of the Vortex factory, which the government agreed to let his wife keep. (As it turned out, this money was claimed by the IRS, which argues that Anna Zhadanov is liable for back taxes, interest, and penalties related to the Vortex money that the Zhadanovs had kept in the safe.) The prosecution agreed to certify that Zhadanov had been cooperative and was therefore eligible for a reduction in his sentence. Ginsberg says it was also understood that Anna Zhadanov would not face criminal charges.

After Zhadanov pleaded guilty but before he was sentenced, the government ordered Chemical Bank to freeze any funds in the account of Gold & Wachtel, Peter Ginsberg's firm, coming from a Swiss bank account held jointly by Sam, Anna, and Eli Zhadanov. The account contained money that belonged to several of Eli Zhadanov's business associates who had given it to him for safekeeping because of the political unrest in Russia. He planned to borrow the money to pay his father's legal fees. But the government claimed the account had been contaminated by money from vial sales. The order freezing the money was entered on March 23, 1994, and lifted two days later. Ginsberg says he persuaded the prosecutors that the freeze threatened Zhadanov's ability to retain legal counsel, and they agreed to split the money with him. "The government may have been able to

forfeit the entire amount," he says, "but they chose not to." Thus Ginsberg had to depend on the prosecutors' discretion for his income while he was still representing Zhadanov.

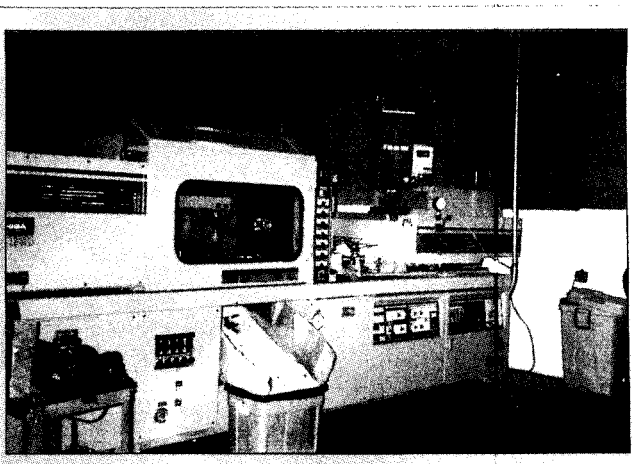
Meanwhile, the prosecutors continued to play up Zhadanov's role in the case, arguing for a substantial prison sentence. They insisted that he must have known he was making crack vials, and they portrayed him as eager for the work, although the record shows he resisted taking cash and repeatedly threatened to stop production. They said Zhadanov had not honestly sought legal advice to clarify his situation but had framed his inquiry in a way that underplayed his knowledge of how the containers were used. They dismissed his lease arrangement with Srebrianski, confirmed by Srebrianski's grand-jury testimony, as a charade designed to distance Zhadanov from production of the vials. They asserted that Zhadanov was always in charge of setting prices and dividing the money. They cited the $50 price increase as evidence of both his greed and his knowledge of the risk involved in making the containers. They called Zhadanov's profits "staggering," estimating that his cost per case was $28, while he sold each case for as much as $250. Gray says he doesn't recall where the cost estimate came from but that it was probably based on Vortex's records. The Zhadanovs say the actual cost was about $170 per case.

The probation officer who prepared the presentence investigation report accepted the prosecution's version of events. Nevertheless, he wrote that "the defendant is considered to have a minor role in the offense of conviction....While the defendant may have held a managerial position within the vial making and distribution activity, his guidelines are predicated upon the distribution of cocaine base—an offense with which he is associated in only the most peripheral way. As such, he is eligible for a significant role reduction, *the greatest of which may not even appropriately address this role.*" (Emphasis added.) In other words, the probation officer suggested that the lowest possible sentence under the guidelines was too high, since it was inappropriate to treat Zhadanov like a crack dealer.

Noting Zhadanov's impressive accomplishments, his impeccable record, and the punishment he had already suffered as a result of the arrest, the loss of his property, and the damage to his reputation, Ginsberg asked for a sentence of probation. In his statement just before sentencing, Zhadanov tried to explain where he had gone wrong: "If somebody come to me and say, make this....I make it. I don't care what this product used for. And this was my mistake. Because I have to care. I never knew what this means, conspiracy. Now I know."

Then he appealed to U.S. District Judge Thomas N. O'Neill to let him remain free: "When I come to this country 20 years ago, I have in my pocket $300. And I started work. Take a look at my hands. I cannot make it straight, my hand. I work for 16 hours in the machine shop to make everything, and I don't know how to spend the money. All the money I spent for the business. ...I don't care about the money at all. I care about my life. Because my life, this is my work. OK? You put me in the prison, I will go to the prison, but I will die."

Citing "the enormity of the offense, the harm that was done, the profit [that] was materialized, and, most of all, the necessity for deterrence of others who might be tempted by greed to engage in this endeavor," Judge O'Neill imposed a sentence of five years for each count, to be served concurrently.



Some of the few pieces of machinery that remain in his family's possession after Sam Zhadanov's 20 years of work designing and manufacturing plastics.

"Unfortunately," Ginsberg says, "the government decided to make an example in this case."

By contrast, the informant Roni Moshe, who was in a much better position than Zhadanov to know who bought the containers and for what purpose, was sentenced to a year in a halfway house and a year of home detention. Srebrianski was sentenced to 18 months in prison, while Edelson, who was on probation for the earlier paraphernalia conviction, got four years. As of this writing, Belkin has yet to be sentenced. Zhadanov has hired a new attorney to appeal his sentence, arguing that the judge misapplied the federal sentencing guidelines and that the prosecution did not allege sufficient factual basis for the money-laundering counts.

Before he reported to prison, Zhadanov put most of his time and effort into the business his son has established to market his inventions. He sold what little equipment the government allowed him to keep to the new business, which rents an industrial space in Linden, New Jersey.

During an interview at the new factory in late December, Anna Zhadanov proudly shows off her husband's patents. Sam eagerly explains some of his recent projects, including an improved blood lance for diabetics and a new kind of flavored plastic toothpick. But when he considers the looming prison term, Zhadanov turns somber. "Right now, I feel very badly, because I don't know where I stand, or what kind of person I am anymore," he says. "I don't know who I am today."

To Gray, Sam Zhadanov is a confessed felon. "He's been treated fairly for what he did," the prosecutor says. "He admitted that he made hundreds of millions of crack vials. That's the extent of the issue, as far as we're concerned." ®

Contributing Editor Jacob Sullum is articles editor at National Review.

One-Shop Stopping

Do Wal-Mart and Home Depot spell the end of "community"? A report on the superstore wars.

By Nick Gillespie

"There's nothing wrong with NIMBY if it's going to *destroy* your backyard," intones Douglas I. Foy, the executive director of the Conservation Law Foundation, "New England's legal watchdog for the environment."

But Foy is not talking about your typical Not-In-My-Backyard target—a nuclear waste dump or a landfill or an incinerator. He's railing against a less obvious villain—superstore retailers such as Wal-Mart and Home Depot. These chains, says Foy, build gigantic stores on oversized lots and drive out all competitors so people *must* shop there. "Sprawl-busting," he declares, "is NIMBY at its best."

Foy is speaking at a conference called "Superstore Sprawl or Vital Communities: Citizens Can Choose," held last December

PETER MACDONALD

Vox populi or vocal minority? Anti-superstore activists claim that big discount chains such as Wal-Mart and Home Depot, far from providing cheap goods and services, hound local retailers out and promote a shallow "drive-by culture."

in Boston and co-sponsored by the Conservation Law Foundation, the National Trust for Historic Preservation, and the Preservation Trust of Vermont.

He is a study in restrained anger. He's mad about the rate of development in Sherborn, the Boston suburb he calls home. "You can't sit in your front yard" any more because of the traffic, he says. Sprawl brings an "ugliness that trashes our neighborhoods" and "threatens our children's safety."

He apologizes for driving to the conference rather than taking public transportation. "The single most damaging environmental problem we are party to is driving," asserts Foy. Because sprawl kills opportunities to shop on foot, we have, he laments, become a nation of "car potatoes."

For a second, I wonder if I have wandered into a meeting of National Buggywhip stockholders by mistake. But I'm definitely in the right place:

"Bargain shopping that costs the community its soul is no bargain," says Richard Moe, president of National Trust for Historic Preservation, a congressionally chartered nonprofit group whose mission is "to foster an appreciation...of American cultural heritage...and to preserve and revitalize the livability of our communities."

Our "sense of community is at risk in America today," warns Moe. Once superstores locate at the edge of town, he says, the downtown empties out and moves to strip malls. "I've yet to see a strip mall that has a sense of community," he says, coaxing a bitter laugh from the audience of about 130 people.

The "struggle" against sprawl "is about maintaining quality of life," Anne Leary, co-founder of Villagers for Responsible Planning and Save Historic East Aurora, tells the crowd. Leary has led the charge against Wal-Mart in East Aurora, New York, a small town about 20 miles southeast of Buffalo. "It's about the druggist who will bring your prescription at 11 p.m. when your kid is sick and will pick up milk and bread for you on the way home." Despite such service, says Leary, the small-town druggist can't compete with the big chains.

Foy, Moe, and Leary are prominent voices in a burgeoning anti-superstore movement. Opponents of mega-retailers charge that, far from providing cheap goods and services, discount chains such as Wal-Mart and "category killers" such as Home Depot actually destroy communities by hounding local merchants out of business, building stores far beyond "the human scale," and promoting a shallow "drive-by culture."

To combat "sprawl—the poorly planned, land-gobbling, automobile-oriented development that typically occurs on the outskirts of cities and town [and] contribute[s] to the physical and economic decline of many traditional and historic downtown business districts"—superstore opponents support stringent land-use measures and other legislation that would greatly restrict commercial development. Over the past few years, activists have opposed—sometimes successfully, sometimes not—plans for new Wal-Mart, Home Depot, and other "big-box" retail stores in states as far-flung as California, Colorado, Florida, Illinois, Iowa, Maryland, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, and Virginia.

The opposition to Wal-Mart and other "superstore Goliaths" has been fiercest in New England, the part of the country most prideful of its regional solidarity and its quaintness. In 1993, the Massachusetts towns of Greenfield and Westford kept Wal-Mart out after highly publicized and bitterly contested fights. Over a dozen similar fracases have cropped up in Connecticut, Maine, and Rhode Island, as well.

Vermont remains the only state in the contiguous United States that is virgin territory for the Bentonville, Arkansas–based retailer (Kmart and several other superstore chains are present). Just when Wal-Mart was set to open up shop in the Green Mountain State—in a scaled-down store in St. Johnsbury—the deal fell through. More recently, Gov. Howard Dean laid down the law to visiting Wal-Mart executives, telling them they were welcome only if they played by the state's rigid zoning and planning rules.

Since they perceive themselves as locked in a life-or-death struggle, it's not surprising that the activists' rhetoric tends toward the extreme: One told me that "mega-stores gut the hell out of a town." And it is often explicitly anti–Wal-Mart; that's one of the costs of being the country's most successful retailer. Wal-Mart, with more than 2,000 stores in the United States alone, is "the exemplar of...corporate colonialism, which is to say, organizations from one place going into distant places and strip-mining them culturally and economically," one opponent told *The Wall Street Journal*. "We're not anti–Wal-Mart," another explained to the *Baltimore Sun*, "we are anti-pig." In 1993, the National Trust declared the entire state of Vermont to be "endangered" by "Sprawl-Mart."

There is a certain irony to the vilification of Wal-Mart as corporate colonizer: Until recently, the chain, started in 1962 by congenial, jes'-plain-folks entrepreneur Sam Walton, was lauded for bringing national brands at low prices to small-town America—in fact, Wal-Mart *symbolized* small-town America. And, despite its size, it still keeps its headquarters in Bentonville and still holds true to its middle-America image and marketing strategy.

Such attributes fail to blunt criticism, however. Syndicated columnist Ellen Goodman has turned the anti-superstore movement into a science fiction morality play. The activists, she has written, "are really fighting 'sprawl-marts,' huge traffic magnets at the intersection of highways, black holes that can suck businesses and everyday social life out of small communities....[T]he resistance...is sustained by people who do not want to become part of the drive-by culture, who do not want to pave paradise and put up a parking lot for a Wal-Mart." "Sprawl-marts," then, aren't merely different ways of doing business. They are instead part outer-space invader, part elemental force, countered only by what Goodman calls a "small and ardent resistance movement." It's *Star Wars*, with Sam Walton as Darth Vader.

The underlying logic of the anti-superstore movement is aptly summarized by the Boston conference's title: Superstore Sprawl or Vital Communities. You can have one or the other, the "sprawlbusters" maintain, but never the twain shall meet. "Sprawl" is inherently bad, the activists say, because it is out of control and wasteful of "social resources"; it escapes contain-

Land-use laws provide superstore opponents with their strongest weapons. In a 1993 referendum, residents of Greenfield, Massachusetts, voted down a variance that would have let Wal-Mart set up shop on the outskirts of town.

DAVID MOLNAR

ment and direction by definition. Superstores, and the sprawl that comes with them, are simply too big to digest—they overwhelm the competition and the landscape alike. They replace personal interactions among townspeople with cutthroat corporate economics.

"What we are really fighting," Elizabeth Michaud, the founder of the Westford Stop Wal-Mart Committee, announces to the conference, "is the apathy and isolation in America." Apathy and isolation, say the activists, are the terminus of auto-dependent superstore sprawl.

A "vital community," in contrast, is planned and zoned, small and beautiful, personal and enduring. Freelance writer and superstore opponent Milly McLean, in describing Wickford, Rhode Island, fills in the details: "A family can live in a Victorian house...just off the main street. Their 8-year-old daughter can walk two blocks along a sidewalk to a decent public school....[T]he family can walk to a grocery store, a drugstore, a bookstore, several banks, a marina, restaurants, and a variety of specialty stores."

Sometimes, the vision of a vital community takes the form of unabashed nostalgia: "I think we have to go back to the way towns were developed in the 17- and 1800s" one Wal-Mart protester told *The Washington Post*. More commonly, there is a sense of freezing the world in its tracks. "It's not that I don't want *any* development or growth," one conference-goer told me. "It's just that things are fine the way they are *now*."

Given such sentiments, it isn't surprising that the activists take a dim view of the competition, change, flux, and novelty inherent in free-market enterprises. "How do you get under the boiler plate of 'free enterprise'?" asks Ron Powers, the moderator of the Boston conference. Powers, who teaches writing at Middlebury College in Vermont, won a Pulitzer Prize for criticism in 1973 and an Emmy for news commentaries in 1985.

"Does free enterprise mean the right to *suppress* other merchants?" he asks rhetorically. "When a grocery store has to go into a Sam's Club to buy its [stock], how can we call that free enterprise?" thunders Edward B. Shils, the George W. Taylor Emeritus Professor of Entrepreneurial Studies at the University of Pennsylvania's Wharton School. "It may be legal, but it's morally wrong," says Shils, who describes himself as "an academician who has a love affair with small business."

"You can argue that every business has a right to do business," says economist Thomas Muller of Fairfax, Virginia's META Consulting Group, "but not to come into your town and be disruptive!" That disruption will be more than strictly economic, warns Shils: "People will move into the community to take these jobs and then you'll have costs for low-income housing. You'll import problems."

For the activists, there is no such thing as creative destruction—the never-finished process by which a market-based society renews itself. Forget about the good stuff markets deliver—lower prices, greater variety and quality, more options for worker and consumer alike. There is instead a focus only on what Powers refers to as "the darker side of efficiencies": the bankruptcies, the dislocations, the difficulties in keeping up. When things change, they inevitably change for the worst. The activists remind me of *National Review*'s *cri de guerre*: "*National Review* stands athwart history, yelling stop." Although many of the anti-superstore crowd doubtlessly would cringe at the comparison (the political bent tends to be left-liberal), they are in fact true conservatives. They are suspicious of the new ways, fond of the old.

The question facing the superstore opponents is how best to keep things as they are—or make them they way they "should" be? There's no doubt that land-use laws provide anti-superstore activists with their strongest weapons for putting the kibosh on new and unwanted development. Consider the advice of Albert Norman. Two years ago, Norman helped organize the successful We're Against the WAL committee in Greenfield, Massachusetts, which channeled its energies into zoning challenges. Since then, he's become the Paul Revere of the anti-superstore movement, publishing a newsletter called *Sprawl-Busters Alert* and working as a paid consultant for groups around the country.

Writing in *The Nation* last year, Norman explained the power that zoning laws give to activists: "In our community, [Wal-Mart] tried to push its way onto industrially zoned land. It needed a variance not only to rezone land to commercial use but also to permit buildings larger than 40,000 square feet. This was the 'hook' we needed to trip the company up. Rezoning required a Town Council vote (which it won), but our town charter allowed voters to seek reconsideration of the vote, and ultimately, a referendum. All we needed was the opportunity to bring this to the general public—and we won."

Speaking at the Boston conference, Norman notes that,

"Courts have thrown out plans for gas stations because of a surfeit of like enterprises." The same should hold true for superstores, he says. An audience member seconds the emotion: "We should be telling these superstores up front, 'You have to comply with our local, state, and federal laws and zones.'"

These are not the brightest days for central planning schemes, but the anti-superstore activists absolutely bear-hug notions of comprehensive land-use planning. You need to have "an underlying plan" for development, Carrie Johnson, a member of the Arlington County, Virginia, Planning Commission, tells the conference. "We're not just stopping the individual mislocated retailer, we're advancing a concept of planning reform," says Anthony C. Wood, director of the Ittleson Foundation. "You have to plan," concurs Dwight Merriam, a lawyer who has chaired the American Planning Association's Law Division. Merriam even jovially ends his conference presentation by showing a slide of a cartoon that invokes a faux-biblical commandment: "Thou shalt plan."

Interestingly, the embrace of zoning and comprehensive land-use planning is founded partly on a recognition of its past failings. "In the 1960s and '70s, planners copped out with large, uniform zones," says Jonathan F.P. Rose, a developer based in Katonah, New York, who works only in downtown areas. Rose's conference presentation details his firm's renovation of Denver's May Building, an aging hulk left over from the 19th century. They put a few big retailers, including clothing discounter TJ Maxx, on the first couple of floors, then threw in some office space, as well as low-income and market-level housing. Although some in the audience seem uncomfortable with the notion of providing aid and comfort to a national discount chain, Rose posits this as a win-win situation: Retailers get access to lots of foot traffic and preservationists maintain a historic building. What Rose laments is the lack of federal credit enhancement for mixed-use buildings. The answer to bad planning is more planning: *This time we will finally get it right!*

The faith in comprehensive planning works hand in fist with a concept of "community" (as opposed to individual) rights. There is little talk of individuals in the anti-superstore movement, except as "victims" of the out-of-town chain retailers. Instead, there is an emphasis on community-level decision making. "*Communities* must decide for themselves," says the National Trust's Richard Moe. "They must decide." The will of the community, however, can't be expressed through choices such as shopping at Wal-Mart or a locally owned store. It can only be gleaned through more formal methods, such as town council votes, planning and zoning board meetings, and referenda.

Sprawl-Busters
ALERT
THINK GLOBALLY
You Can Help Us Make A Difference...
The World Over
WAL-MART
DESTROY LOCALLY
& Inside: East Aurora, NY, Mount Joy, PA, Ithaca, NY, Branford,CT, Flemington,NJ, New Milford,CT, Plainville, CT, The Megastore Diet, Infinity Properties, The Ten Foot Rule, and Wal-Mart's Latest Rallying Cry: '200 in 2000'.
if they build it WE WON'T COME!
WESTFORD
Perfect as is!

For the activists, there is no sense of creative destruction—the never-ending process by which market-based societies renew themselves.

In Greenfield, Massachusetts, dubbed the "birthplace" of the anti-superstore movement by *Governing* magazine, there seemed to be a bit of confusion about what form community decision making should take. In 1993, developers asked for zoning variances so Wal-Mart could build a 121,267-square-foot store on the edge of town. A non-binding referendum to allow the variances passed easily. Then a majority of the Town Council voted in favor of granting the variance (the land was originally zoned for industrial use). But the town's charter also allowed for a binding referendum on the matter, which Al Norman's anti–Wal-Mart group pushed for. Sixty percent of registered voters turned out for the referendum and the plan for the new store lost by 9 votes, 2,854 to 2,845 (Greenfield's total population is 17,000).

The result, says Norman, "was a repudiation of the assumption that of course people would want another discounter in town." People on the losing end are not as sanguine: "The vote has split the town," says Selectman Bernard McGarrah, who was in favor of the Wal-Mart. "A smoldering resentment lingers."

Superstore Sprawl or Vital Communities is, without doubt, a brilliant way to frame the discussion. The phrase has a catchy cadence and populist ring. It rolls off the tongue and pops the question in a way that precludes too much reflection. *Your money or your life? Sprawl or community?* There is, the question implies, a single obvious answer.

And yet the dichotomy embedded in the phrase is fundamentally false. There is no simple either/or answer when you're talking about complex human interactions and competing definitions of community. Although superstore opponents talk as if the distinction between sprawl and vitality is obvious, that's far from the case.

For instance, the activists fail to address the most basic point of the issue: People *like* these new stores. Wal-Mart, et al., aren't forcing people at gunpoint to shop their aisles. "It's worth remembering that America doesn't hate Wal-Mart," insists Leonard Berry, director of the Center for Retail Studies at Texas A&M. "There is obviously more than a little resentment in some communities towards Wal-Mart. But America doesn't hate Wal-Mart; America *shops* at Wal-Mart."

To be sure, Berry is something of a company man. The Center for Retail Studies is, he volunteers, funded by large retailers. "Wal-Mart is one of the 40 corporate sponsors, as is Kmart, Home Depot, and most of the companies on your list," he says with a resigned chuckle. But his observation is demonstrably true. When he notes that "no other company comes close to the success [Wal-Mart] enjoys today," the point is inarguable.

NEWSLETTER: ALBERT NORMAN
BUTTON ART: JONNIE WALKER-ROHS

A more accurate—if equally contentious—way to frame the argument is to compare evolving, self-rejuvenating communities that adapt to the needs of their citizens and ones that embody what F. A. Hayek called the "fatal conceit": the belief "that man is able to shape the world around him according to his wishes."

In this sense, the anti-superstore activists are the enemies of vitality, not its champions. By seeking to preserve things as they are—or were—they squelch spontaneous developments that arise in response to the myriad, often inchoate needs and desires of individuals.

If the activists falsely oppose superstore sprawl to vital communities, they also misrepresent what happens to a town's economy when a mega-retailer opens its automatic sliding doors. The trends that have turned customers off to downtown shopping areas were in place long before chains such as Wal-Mart, Kmart, and Target (all of which opened in 1962) arrived on the scene.

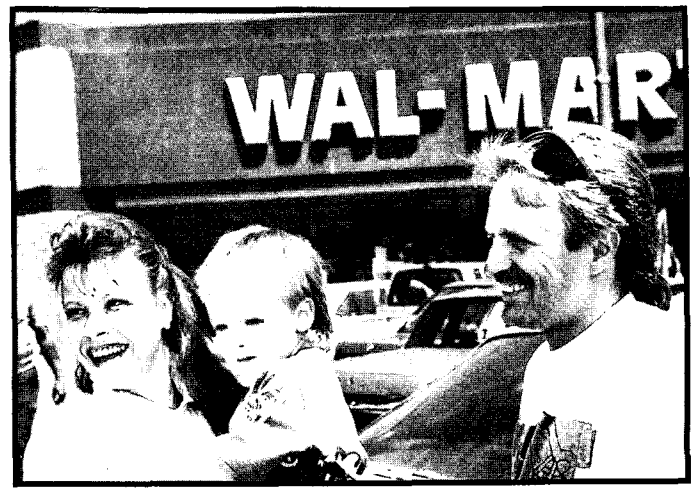
"We started seeing the demise of downtowns in the 1920s and '30s, when cars started to become more popular. Basically, it began when people gained mobility," says Kenneth Stone, an Iowa State University economics professor who has studied the impact of Wal-Mart on towns in the United States and Canada. "Especially after World War II, you started seeing people migrating out of cities and then shopping closer to where they lived. The advent of shopping malls in the '50s and '60s really took people out of the downtowns," says Stone.

For the anti-superstore activists, wide-scale mobility was the beginning of the breakdown of "livable communities." The automobile looms large in the activists' worldview as a symbol of American alienation. Cars, after all, allow people to scatter and form associations based on individual needs and desires, as opposed to living within a static, immobile community. And, as with the superstores they drive to, Americans like cars—and always have. In fact, by 1930, there was one car for every 1.3 households.

Does a Wal-Mart or another superstore inevitably spell doom for local merchants? Iowa State's Stone—who says he neither likes nor hates the chain—notes that overall sales in local areas will increase at least for the first couple of years. If you're selling something different from what Wal-Mart's offering, you'll probably be helped. If you're selling the same things, you'll probably lose sales if you don't reposition yourself, says Stone. "The truth is, a lot of local merchants have become better merchants because the level of competition has been raised."

John L. Gann Jr., head of an Illinois-based consulting firm that assists older businesses, agrees with Stone. He says the anti-superstore activists are essentially local protectionists who would rather compete in a political forum than in a commercial one.

Gann, who has worked with downtown areas in seven states in the industrial midwest and northeast, says that Wal-Mart and similar big retailers might put inefficient shopkeepers out of business, but the real problem is that many traditional, independent merchants aren't providing the service, the hours, the parking, or the merchandise people want. "A lot of shoppers today prefer a large selection and chain stores with names and reputations they know," says Gann.



AP WIDE WORLD PHOTOS

Happy shoppers or unwitting dupes? The activists fail to address the most basic point of the issue: People like these superstores.

And, despite claims that mega-stores are unstoppable "retail juggernauts," Gann notes, "When Wal-Mart or whoever opens a store, they make an investment in their store, their merchandise, their personnel, and what have you. They don't have one customer. Every customer they get, they have to win. And then they have to persuade people to keep coming back."

Stone's and Gann's comments help explain what I encounter during my trip to Boston. After the Superstore Sprawl conference is over, I take the opportunity to check out some nearby towns that have had conflicts over mega-retailers moving in. It's Sunday, and I'm in Quincy, a suburb a few miles south of Boston, at the future home of a contested Wal-Mart. The site is just flat ground at this point, with nothing but a rusty front-end loader indicating future development. Across the road is a condominium complex.

"It's going up and I think it'll help out," says a real estate agent. She's there to meet a prospective buyer at the condo development. "You know, the town was going downhill, practically deserted. But it's coming back the past few years. People squawk a lot, but things usually work out OK. My husband and I both think it's good when [superstores] come in. But then again, growth is good for me. And for my husband. He's a contractor, so he was really happy when Home Depot came to town in '92. The smaller stores charge an arm and a leg for a few hammers and nails."

Across town, the Home Depot parking lot is about three-quarters full. The store is truly gigantic—it's like walking into an airplane hangar. It is packed with customers and salespeople, with the sights and sounds of heavy business: registers ringing, P.A. announcements, calls for price checks, the hum of customers' conversation.

Behind the service counter are two workers whom I'll call Judy and Janice. They are adamant about the benefits of Home Depot. "We both used to work at Grossman's [another big chain store] up the expressway," says Judy. "But it charges too much for everything. It's going under."

"When we heard they were opening up the Home Depot," says

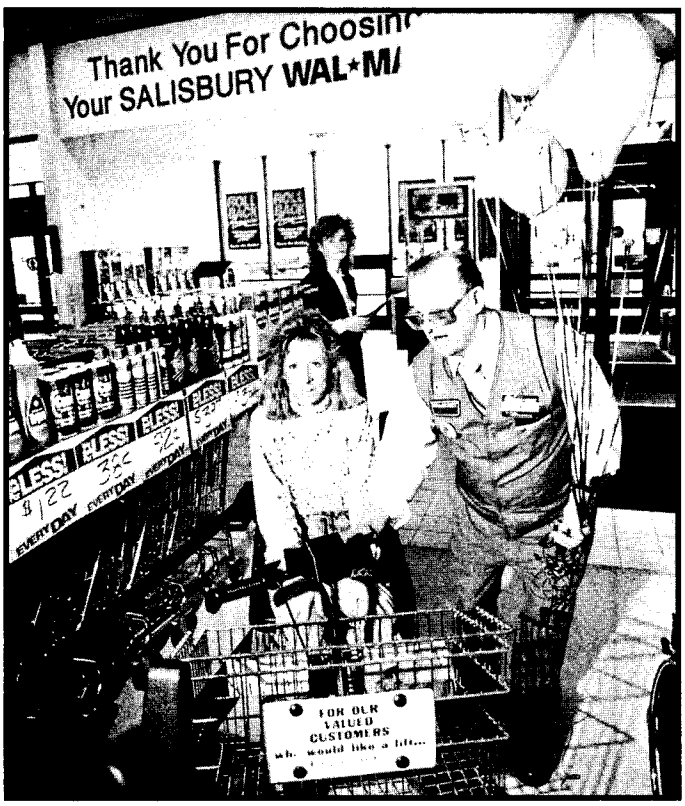
Janice, "we applied right away. This is a better store. It's cheaper and it's better. It's helped a lot of people." They won't discuss pay, but they assure me they are getting a better deal here than they were at their previous jobs.

In the parking lot, I almost bump into a man and his son loading floor tiles into a truck. "See these?" he says, pointing to the tiles. "These cost about half of what they are most other places. I wouldn't even be redoing the bathroom floor otherwise." The amount of extra activity generated by lower prices is worth reflecting on. Most of the anti-superstore activists are zero-summers of one stripe or another, claiming that there is a fixed amount of economic activity in a given area. But it's true that as costs fall, people buy more, remodel more, go out more.

But I am skeptical of my experience so far, if only because it all too perfectly confirms the pro-superstore theory. A real estate agent, superstore workers, and customers—this is a self-selecting sample. Of course these people would like superstores. So after Home Depot, I drive down the road a mile to Curry Hardware, a small store squeezed into a corner lot so cramped that it's tough getting in and out of the parking area. These people, I figure, should have a different take.

But the three salesmen I talk with inside are having none of it. "You know, when Home Depot opened up, we were really worried," says one. "They made us change our attitude. Now, we work to serve the customers better."

I mention a banner hanging at Home Depot, one boasting "Nobody Beats Our Service." "Yeah, right," the salesman laughs. "They can't compete with us on service." Besides training the



"Every customer [Wal-Mart, et al.] get, they have to win," says business consultant John L. Gann Jr. "And they have to persuade people to keep coming back."

help to be more responsive to customer needs, he says, the owner opened up on Sundays for the first time and varied the store's product line to stay competitive. "We get some customers who see us on the way to Home Depot, and we get some who get tired of Home Depot." Overall, he says, sales are up, and his boss has even added employees.

After Quincy, I'm off to Avon, further south of Boston and home to an actual Wal-Mart. The lot is about half full, which strikes me as skimpy for the Christmas season. A huge U.S. flag blows in the wind and a banner stretched across the building spells out Wal-Mart's basic formula for success: "We Sell for Less, Satisfaction Guaranteed." The chain seems big on banners. Inside, there's one over the checkout lines proclaiming, "You Are the Boss!" Another proclaims that the store is hiring and paying "competitive" wages.

There is, it seems, everything here: clothing, books and magazines, toys, gifts galore, hardware, and automotive products. An item I'm interested in doesn't have a price tag on it, so I ask a saleswoman to help me out. "How do you like working here?" She tells me that it's just fine. She had been unemployed before, and the hourly wage of $5.75 pays better than her last job did. She puts in about 20 hours a week on a flexible schedule, which works out since she has a child and does babysitting on the side as well.

In the checkout line, the woman in front of me asks me to move ahead of her. "I don't want my friend to see what I'm buying her," she explains. When I ask her if she likes Wal-Mart, she nods vigorously. She doesn't have a car, so she doesn't come here that often. "But when I do," she says, "I pick up everything I want for a long time. It certainly made Christmas shopping easier—and cheaper."

Who should decide where that woman can and can't shop? The *community*, say the anti-superstore folks. But kicking decisions up to the community level always sends a shiver down my spine. After all, who gets to decide what exactly the "community" is, much less who should speak for it and where its best interests lie? Communitarianism always assumes that a group has a collective will somehow at odds with the choices made by individuals expressing themselves through voluntary activities, associations, and transactions.

In Greenfield, the townspeople employed that almost mythic mechanism of direct participation—the town vote. What could be more democratic, more attuned to vox populi? Do we want a Wal-Mart or not? Let's put it to a vote. While such direct democracy seems more American than apple pie, it actually contains the seeds of mob tyranny. If the people get to OK every new enterprise, could they legitimately vote an existing business out of town? Or an unpopular family? Once the democratic process is extended to private-sector issues, it becomes very difficult to define meaningful limits.

James Buchanan, the 1986 Nobel prize winner in economics, is critical of winner-take-all approaches that, by design, frustrate individual preferences. When Greenfield, for instance, held its referendum on Wal-Mart, only one outcome was certain: A segment of the town would not be able to satisfy its preference, ei-

AP WIDE WORLD PHOTOS

ther for having the store or not.

In *Liberty, Market, and State*, Buchanan argues that, since individuals are the ultimate arbiters of "value," of what is important and meaningful to themselves, democracies work best when they allow as many people as possible the option of satisfying their preferences.

"A situation in which individual preferences are met...[is] superior to a situation in which preferences are overruled," writes Buchanan. "Consider [a] simple referendum example, one in which the preferences of a majority for alternative A are satisfied, while the preferences of a minority for alternative B are overruled. Clearly such a result is...inferior to one in which alternative A could be chosen for members of the majority and alternative B could be chosen for members of the minority." Consequently, Buchanan argues that to preserve not only liberty but equality, as many aspects of life as possible should be left outside a winner-take-all political process.

Anti-superstore activists would, no doubt, argue that mega-retailers are simply incompatible with the "common good," that they would fray the economic fiber of the community to the breaking point. Those claims, however, rest upon fiction (the "common good") and misinformation (local retailers can't compete). Following Buchanan's line of thought, the optimal outcome would be to let the superstores in, and then individual townspeople could patronize whatever businesses they chose. "In a way," says John Gann, the Illinois-based business consultant, "the anti–Wal-Mart people don't have anything to worry about. If they don't go to Wal-Mart, it won't stay open very long."

Another argument: Let us suppose that superstores make things easier and cheaper only because, as Claudia Wu, legal counsel for the National Trust, puts it, "The zoning we have nowadays makes it totally impossible to replicate the communities we want." If we had "better" zoning could we, as the activists claim, once again have the kind of compact, mixed-use communities that existed before the advent of "rational" planning?

The answer will not comfort sprawlbusters. While there's little doubt state and local planning and zoning laws hugely influence development, they are essentially negative devices that can prevent specific types of development, not engender them, says Bernard Siegan, professor at University of San Diego School of Law and author of the recently reissued 1972 classic *Land Use Without Zoning*. "It's possible to succeed with elaborate mixed-use schemes, but they're fraught with difficulties and they almost never hold up over the long term. If they work at all, the planners have been lucky, since it isn't the planners who decide what works. It's people out in the market."

The major difficulty for planners is, at rock bottom, one of information, says Siegan. What do—or will—people want at a given time, in a given place, for a given cost? This information is so widely dispersed throughout an economy that no individual or group can collate it all, especially under the constraints most planners face.

Planning, says Siegan, is inevitably a political process about making a town or city conform to somebody's particular idea of what it should be. But even when planners can push their plans through, it is virtually impossible either to gather all the necessary information to create a successful plan or to make people follow it. Private developers do a better job, notes Siegan, because they can focus more specifically on market (as opposed to political) factors—and even they fail often enough.

Among planners, says Siegan, "There's a sense of 'Stop the world. This is the way things should be.'" That's understandable, he says, but that kind of thinking leads to a stagnant society. Think of plasterers, he analogizes. When drywall came in, it wiped them out. So what are you going to do—not use drywall, even though it makes things cheaper and lets more people buy and rent houses?

The anti-superstore activists' zest for comprehensive land-use planning is ultimately an embrace of stasis, of maintaining things just-so. That sentiment, of course, isn't new to anti-superstore activists. Neither is the rhetoric used to express it. The contemporary anti-superstore movement is hugely reminiscent of an earlier tussle.

In the 1920s, chain stores were the pariah of the day, particularly the A&P grocery stores (at its height, A&P operated over 15,000 shops in the United States). Chains, because of larger economies of scale and increased efficiencies in distribution, tended to sell a wider variety of goods at cheaper prices, which cut into local merchants' profits. The chains were new, different, and very successful.

As chains began to dominate the commercial landscape, they, like the superstores of today, came under attack as destructive and evil. Louis D. Brandeis attacked them along "human scale" lines: "I have considered and do consider that the proposition that mere bigness cannot be an offense against society is false, because I believe that our society, which rests upon democracy, cannot endure under such conditions." A chain-baiting radio personality exhorted Americans, "Wake up! We can whip these chain stores....We can drive them out in thirty days if you people will stay out of their stores." A 1922 book, *Meeting Chain Store Competition*, offered this analysis: "Every retailer who has to meet chain store competition...needs no one to tell him what a chain store is. To him, it is a cut rate competitor managed from the outside by a soul-less corporation."

Chain baiting, although ultimately unsuccessful, had consequences. As Harvard Business School professor Richard S. Tedlow notes in his 1990 book, *New and Improved: The Story of Mass Marketing in America* (from which the previous examples are drawn), "In 1933, some 225 anti-chain bills were introduced in 42 state legislatures; 13 were passed. Chain taxes had been passed in 27 states by 1939, although not all were still in force that year." It also prompted longer-lasting federal antitrust legislation aimed at reducing the chains' advantages; the laws had the effect of raising prices to the average consumer. (The American Booksellers Association is currently using one of those laws, the Robinson-Patman Act, to sue several publishers for allegedly granting bookstore chains "discriminatory" discounts.)

Those laws ultimately had less effect on the chains than the rough and tumble of the marketplace. The history of A&P, as dominant an economic force as has ever existed in the United

States, is instructive. Despite being the nation's second-largest non-industrial company in 1950, by the early '80s, "A&P occupied a position in the American business economy in no way comparable to its situation three decades earlier," writes Tedlow. Sears is another example of a leader who lost the way. Indeed, today Kmart is going through a prolonged financial crunch, and financial analysts are beginning to wonder if Wal-Mart's fortunes are reversing.

Or consider my wife's paternal great-grandfather. During the Depression in southeastern Ohio's sparsely populated Jackson County, he started selling vegetables from a pushcart. He beat out more established stands by selling cheaper and going to where people lived. After long hours, a lot of hard work, and a little bit of luck, he created a local supermarket chain and became the big kid on the block. No sooner had he reached the top of the heap, though, than Big Bear and Kroger blew into town. From the '40s through his death in the early '70s, he was locked in mortal combat with bigger competitors. The chains offered more goods at lower prices and, damnit to hell, they had what seemed like endless money for advertising and promotions.

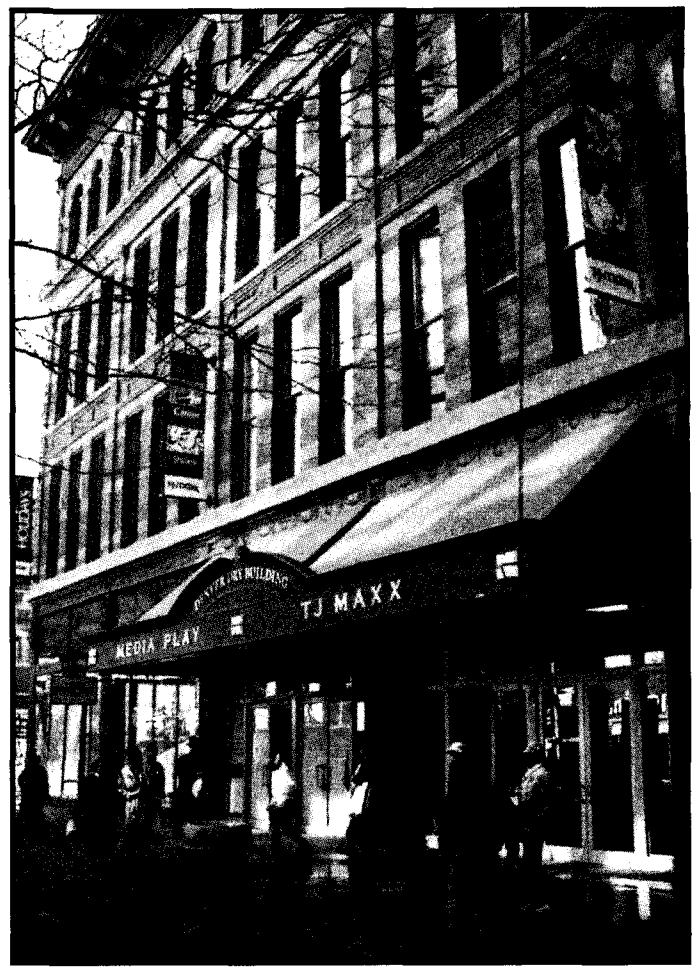
He was, I'm told, a Christian man, but his last words are rumored to have been, "Get that effin' Big Bear if it's the last thing you do." It didn't work out that way at all. His family eventually got out of the supermarket business and into other things. It wasn't easy, it wasn't simple, but it had a certain finality to it. Along with the rest of the county, his descendants buy their groceries from Big Bear and Kroger now. It's hard to say who's worse off that way.

A confession: I am a child of sprawl. I grew up in New Jersey, a state synonymous with sprawl. (Indeed, one wag wrote to the Burlington, Vermont's *Free Press*, that if Wal-Mart came in, the state's slogan might as well be "Just like New Jersey, only colder.") My hometown, Middletown, is about 50 miles south of Manhattan and a few miles inland from the ocean. *Middletown*—the blandness, the obviousness, the generic quality of the name evokes the image of a small, idyllic American town.

Despite the geographic suggestiveness of its name, however, the town is not in the middle of anything other than its own teeming sprawl. My town's character, you see, hasn't been harmed by sprawl—it *is* sprawl. Driving through it, a glib traveler might well see it as the epitome of the nameless, faceless, featureless suburbia you hear so much about in rants from city dwellers, rural folk, and, well, suburbanites.

There is a long history to Middletown—founded in 1664, the place is crisscrossed by Revolutionary War retreat routes and dotted by 19th-, 18th-, and even 17th-century buildings and graves—but you would have to know where to look to see that history's presence. In 1960, a few years before my family moved there, Middletown's population was about 40,000. Nowadays, it's almost double that. The town's two main arteries are clogged with strip malls, chain stores, and parking lots. It literally has no single center, no one "Main Street." My parents' house, bounded once by a dense, impenetrable woods, now abuts an old-folks' home and commands a view of an increasingly busy highway. Not exactly Mayberry, RFD.

But to write off such a place as dead or sterile is to validate



A win-win situation? Developers rehabbed Denver's historic May Building and designated space for offices, low-income and market-level housing, and chain stores, including clothing discounter TJ Maxx.

the phony logic of Superstore Sprawl *or* Vital Communities. My hometown is sprawling yes, but vital, too. My parents, along with many other residents, balked some at the idea of development, but they also appreciate and benefit from it. Within a two-mile drive, my parents can choose from a cornucopia of goods and services that weren't available even 20 years ago. Within a quarter of a mile, they can walk to stores that didn't exist 10 years ago. My parents, who in old age are no longer as mobile as they once were, have neighbors, friends, and merchants (some of the chain-store variety) who help them out. And they do the same in return. Surely, that is a "vital" community.

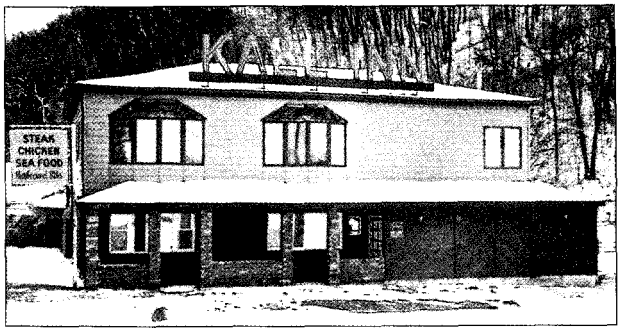
Change, flux, and contingency may be inevitable and salutary (especially when responding to unobstructed market forces), but like most forms of growth, they are rarely painless. It is surely asking too much that creative destruction seem creative to all the people it affects. But it is even more absurd to try to maintain the status quo (or an idealized version of the past) in the face of evolving desires, products, and technologies. In seeing sprawl as the enemy of vitality, the anti-superstore activists turn a blind eye to the very ways that people keep their communities alive.

Nick Gillespie is assistant editor of REASON.

Slash and Burn?

By Rick Henderson

The regulatory revolt takes the Hill.



The Kall Inn: The family-owned restaurant may become a casualty of federal regulations.

THIS SUMMER, THE KALL Inn, owned by the Kahle family and situated near the town of Kieler in the southwestern corner of Wisconsin, hopes to celebrate its 50th year of operation. Since 1957, the 25-table restaurant has been located in a former fish market, a mile and a half from the main highway on the opposite side of the Mississippi River from Dubuque, Iowa. Bass fishing lures most visitors to the sparsely populated area, but Wayne and Mary Kahle, who have run the inn since 1965, offer another attraction—fine dining that draws customers from as far away as Chicago, some 175 miles east.

In March of last year a Department of Natural Resources inspector notified the Kahles that it was illegal to continue drawing water from the inn's well, which is located beneath the kitchen. The water wasn't contaminated. In fact, it is much purer than needed to pass safety standards. At the most recent inspection, nitrate levels were only 6 percent of the legal maximum. The well is protected by a cement sleeve and cap that have been in place since 1972.

But to comply with the federal Clean Water Act, the state DNR gave the Kahles three choices: 1) Construct some type of above-floor extension of the well cover that would be directly in the traffic pattern of the kitchen staff. 2) Spend at least $10,000 to dig a new well away from the building. 3) Or close the restaurant.

The Kahles can't understand why they've been targeted for such scrutiny. "It's not fair," says Mary. "A health hazard is one thing," says Wayne. "But all [the DNR] says is that we're 'not complying.'" State Rep. Duane Johnsrud, recently appointed by Gov. Tommy Thompson to chair the DNR, is pushing state regulators to lay off. But the regulators are driven by federal requirements, and it isn't clear that the state can back off without federal permission.

The Kahles' story isn't unusual; it has become typical. And their story helps explain why Democratic congressional barons were unceremoniously tossed out of office last November. The Washington establishment routinely defends the type of nutty regulations that do nothing to protect public health or safety but can bankrupt entrepreneurs like Wayne and Mary Kahle.

As Rep. John Mica (R-Fla.) said at a February 22 Capitol Hill press conference, "You can't wake up each day, put your feet outside your bed, and complete your day without violating some type of rule—particularly if you're engaged in business or industry or any type of productive activity." Republican leaders in Congress, backed by conservative and moderate Democrats and some bomb-throwing backbenchers of both parties, are pushing a regulatory rollback that could dramatically shrink the power of bureaucrats and begin to relegate "Imperial Washington" to the history books.

Freshman Rep. David McIntosh (R-Ind.), chairman of the House subcommittee on regulatory affairs, sees the war against regulation advancing simultaneously on three fronts: preventing scheduled regulations from taking effect; changing the regulatory process so that new government rules are less burdensome; and reviewing (and in some cases eliminating) existing red tape. Despite the fervent opposition of the White House, left-wing Democrats, and outside apologists for the regulatory state, the impulse to deregulate is gaining strength.

EVERY PRESIDENT SINCE GERALD FORD has asked Congress to subject regulations to cost-benefit analyses before putting them on the books and has set up internal review panels to cut red tape. The only notable deregulations occurred under Jimmy Carter (interstate trucking, airlines, railroads) and Ronald Reagan (oil, natural gas). In each case the White House had enough allies on Capitol Hill to override the typical legislative impulse to pass lots of laws and then let regulatory agencies take responsibility for enforcing them.

The Bush administration, however, dropped three of the biggest regulatory bombs ever: the 1990 Americans with Disabilities Act, the Clean Air Act amendments of 1990, and the 1991 civil rights act. Bill Clinton added the Family and Medical Leave Act in 1993. His administration promulgated 4,866 regulations last year; it took 64,914 pages of the *Federal Register* to explain them.

On February 24, the House of Representatives clearly indicated that times have changed. Over the promise of a presidential veto, the House passed a moratorium on existing regulations by a nearly veto-proof margin of 276 to 146. The moratorium, which would affect many of the 4,300 regulations scheduled to be implemented between November

ED KRUSKA

20, 1994, and the end of this year, was led by McIntosh, who was staff director of Vice President Dan Quayle's Council on Competitiveness.

The moratorium would slow down a series of burdensome rules scheduled to take effect this year. Among them: new Occupational Safety and Health Administration rules on ergonomics, which would force businesses to redesign their workplaces and could cost $21 billion to implement; 1,700 pages of regulations under the 1977 Clean Air Act that would require new emission controls in California on everything from factories to lawn mowers; and the listing of 400 new plants and animals under the Endangered Species Act. McIntosh says the moratorium "offers a clear-cut 'yes' or 'no' on more federal regulations."

The moratorium would not absolutely prohibit any new regulations. Indeed, it has loopholes that exempt the ubiquitous "national security" matters. Executive branch agencies could also continue to implement regulations that prevent "imminent threats to health and safety," although Congress could overrule them. The moratorium also lets stand rules that streamline or reduce regulatory burdens.

But the moratorium could prevent further White House mischief as Congress considers more-sweeping procedural reforms in the Contract With America. As March began, the House passed bills that would subject new regulations to risk assessment and cost-benefit analyses, require federal agencies to identify voluntary alternatives to new government rules, and compensate property owners when regulations reduce the value of their land.

THE 100-DAY DEADLINE HOUSE REPUBLICANS imposed on themselves to pass the Contract With America has compressed the time in which bills can be considered on Capitol Hill. The concept of a "contract" has also made it difficult (if not impolitic) for House leaders to accept big changes in the components of the various bills.

So while the House seeks to contain the expansionist regulatory state, the Senate may actually try to roll it back. Majority Leader Bob Dole has introduced a regulatory reform bill that would, in some instances, go further than the House. Its bill requires cost-benefit analyses not only of new regulations but also of existing ones if individuals or business request that they be reviewed. If the review determines that a regulation has greater costs than benefits, the agency has to modify or revoke it.

Dole, once called "a tax collector for the welfare state" by Newt Gingrich, seems an unlikely advocate for smashing the regulatory state. But he is running for president, and he certainly knows how to follow public opinion. Dole's chief rival for the Republican nomination, Texas Sen. Phil Gramm, has staked out hard-line positions against affirmative action and federal spending, and for enhancing the rights of business, property, and gun owners. And Capitol Hill insiders claim Dole won't let himself be outflanked by anyone.

Dole has appointed his own Regulatory Relief Task Force, led by Sens. Kay Hutchison (Tex.) and Christopher Bond (Mo.). The task force issued its own "Top 10" list of worst regulations, led by the Endangered Species Act, the Clean Air Act, wetlands laws, and OSHA. Notably absent from the list, however, are three recent regulatory extensions: the 1991 civil rights bill, the ADA, and the family-leave act. "There is no conceptual justification for giving a free ride to the so-called civil-rights laws," says Murray Weidenbaum, chairman of the Center of the Study of the American Business and one of the principal architects of deregulation in the Reagan administration.

Weidenbaum is especially critical of federal enforcement of the ADA. "To require [businesses to construct] expensive facilities that are almost never used," he says, shows that "the aim [of the regulation] is to maximize the cost to punish those of us who aren't disabled." Dole, however, has been a major supporter of the ADA, a role he has yet to reconcile with his new persona as scourge of the regulatory state.

ALTHOUGH DOLE'S BILL WOULD SUBJECT some existing regulations to cost-benefit analyses, a bipartisan group of more-radical House members want to go further: They would force *every* federal regulation to undergo review each seven years. Any regulation that couldn't be justified by the executive branch or Congress would be eliminated.

The bill, sponsored by Reps. Jim Chapman (D-Tex.), Mica, and Majority Whip Tom DeLay (R-Tex.), would require each agency to appoint a person to oversee the regulatory review. The agency would have seven years to list the regulations it enforces. For each regulation, the agency would have to recommend leaving the rule in place, modifying it (proposing suggested changes in the *Federal Register*), or eliminating it. This report would go simultaneously to the Office of Internal Regulatory Administration at the Office of Management and Budget and to Capitol Hill. Congress could ultimately modify or eliminate rules the executive branch wanted to keep. New regulations would face sunsetting within three years.

At a Capitol Hill press conference introducing the bill, Chapman was asked if he actually expected the bill would pass. He replied that anyone who opposes the idea of sunsetting regulations is in the position of defending the most bizarre laws on the books. Two he cited: The Americans with Disabilities Act requires automatic-teller machines at drive-through windows to be accessible to the blind. And, to comply with U.S. Department of Agriculture regulations, butchers must keep their floors wet; to comply with OSHA, however, the floors must be dry. "The notion that you should write [a regulation] and forget it," he said, "is simply nonsense."

If the regulatory revolt continues to simmer as different versions of the same bill pass the House and the Senate, the bill that reduces regulations more may be the version that emerges for a final vote. And Congress could even combine the toughest provisions from both houses into the final bill.

Consider property rights. The Senate

bill introduced by Gramm would allow property owners to sue for compensation when federal regulations reduce the value of their land by 25 percent or $10,000, whichever is less.

The House takings bill has a 20-percent threshold and no dollar alternative. But it lets landowners file for compensation through an administrative procedure rather than by going to court, a prospect that's too costly for many small landowners. Peggy Riegle, whose Fairness to Landowners Committee represents more than 16,000 "mom and pop" property owners, says her members will push for any final bill to have an absolute-dollar threshold and the administrative-procedure provision.

SUCH PROPOSALS WON'T SUCCEED WITHout a struggle. As the House began to debate the moratorium on February 21, Bill Clinton responded with his mantra: "We want leaner government, not meaner government." He gave his cabinet agencies four months to list unnecessary regulations that could be pared back but stated his unequivocal opposition to any sort of moratorium. As with his "reinventing government" initiative, the president intends to make government more efficient rather than less intrusive.

And it's clear that Clinton intends to reduce the burdens on bureaucrats rather than on business or landowners. At the February 21 press conference, the president crowed about reducing the forms local school districts have to fill out to qualify for federal school lunches, eliminating the federal government's 10,000-page personnel manual, and "slash[ing] the small-business loan form from an inch thick to a single page."

Clinton responded to the proposed moratorium by asking federal agencies to push "horror" stories citing the alleged harms a regulatory "time out" would cause. The moratorium would, for instance, prevent the Consumer Product Safety Commission from forcing a redesign of five-gallon buckets to prevent children from drowning in them; it would stop the Department of Transportation from requiring airline first-aid kits to include latex gloves; and it would keep the Agriculture Department from determining when grocery-store chickens could be labeled "frozen" or "fresh."

The Clintonites presented their list. The public yawned. The republic should survive such threats.

"Last November, the American people sent us a message: Rein in big government," said Dole when he introduced his bill. "Stop micromanaging our lives through burdensome and costly regulations." The Kahles, and thousands of other business and landowners, hope the Republican Congress can back up its tough rhetoric with substantive action.

Rick Henderson is Washington editor of REASON.

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Exclusive Justice

By Robert Bauman

Good faith breeds bad cops.

ON FEBRUARY 7, BY A VOTE OF 303 to 121, the U.S. House of Representatives voted down the Fourth Amendment. Rep. Melvin Watt (D-N.C.) had proposed attaching the text of the amendment—which guarantees against unreasonable searches and seizures—to pending crime legislation. But the House, led by Republicans who claimed that Watt's proposal would have "gutted the bill," instead voted to give the police the right to use their own judgment and good faith in conducting warrantless searches and seizures. The bill, H.R. 666, is pending at press time before the Senate Judiciary Committee.

The Supreme Court has already upheld many exceptions to the so-called exclusionary rule that prevents illegally obtained evidence from being used in court, basing such exemptions on a broad theory of "reasonable" or "articulable" police suspicion of criminal activity. The proposed GOP legislation would codify this highly elastic concept of police power. Before Congress makes the police doorstep arbiters of the Constitution, it is worth examining some of the reasons, from myriad locales, why that isn't always a good idea.

Boston. If police lack reliable informants on whom to base a "probable cause" request for a search or arrest warrant, they sometimes invent them. Harvard law professor Alan Dershowitz has stated what most in the judicial system know but choose to ignore: Police routinely lie in order to convict defendants. A 1988 investigation of the Boston police Drug Control Unit revealed that its members routinely fabricated the existence of informants and lied to obtain warrants from judges.

At 3:15 p.m. on March 26, 1994, a 13-member SWAT team from this unit, wearing helmets, fatigues, and boots, armed with shotguns and 9-millimeter Glock pistols, sledgehammered through the apartment door of a 75-year-old black minister, the Rev. Acelynne Williams. They were searching for guns and drugs (never found) based on a statement of yet another "confidential informant." At 3:58 p.m., Williams (5 feet 7 1/2 inches tall, 155 pounds) was pronounced dead of a heart attack after being forced to the floor and handcuffed by three police officers, two holding his arms, one pinning his legs. The autopsy showed death caused by acute myocardial infarction brought on by heart disease and "emotional stress."

Six weeks and two official investigations later, the Boston police commissioner concluded that police had raided the wrong apartment, partly because of a bad tip from an informant who was drunk the night he visited the alleged den of guns and drugs, partly because of bad police work and lack of proper supervision.

New York. Police lying to support criminal charges against arrested persons is common practice in New York City, according to the official report of the mayor's commission investigating police corruption. After 1993–94 hearings, the commission concluded the NYPD routinely makes false arrests, tampers with evidence, and commits perjury on the witness stand. "Perjury is the most widespread form of police wrongdoing," the report stated, noting courthouse cognoscenti have coined a new descriptive word for the activity—*testilying*.

New York Legal Aid Society officials say "testilying" is a routine police exercise that occurs without sanction from prosecutors or judges, who often cooperate in the charade by not challenging officers who tailor testimony to meet search-and-seizure constitutional objections and to cover deficiencies in police work.

New Orleans. In late 1994, the corruption in the New Orleans police department came to a head when a police officer had a 32-year-old mother murdered for filing a brutality complaint against him. A new police commissioner called in the FBI to try to change a system that since 1985 has generated a rate of citizen complaints about civil rights abuse by police 52 times that of New York City.

Civic leaders in New Orleans have charged police with beatings, kidnappings, shootings, and torture of innocent citizens; routinely falsifying reports; lying under oath; robbing drug dealers; and

HENRY PAYNE

keeping recovered stolen cars for their own use.

Los Angeles. The *Los Angeles Times* reported in January 1992 on the trial of six Los Angeles County sheriff's narcotics officers charged with "stealing hundreds of thousands of dollars in cash and property during drug raids, beating suspects, planting narcotics and falsifying police reports." Ten L.A. county officers were convicted of various charges. A former L.A. sheriff's deputy, Robert Sobel, who was indicted and turned state's evidence, testified his narcotics unit stole $60 million in cash and property during 1988 and 1989 alone.

Daytona Beach. In June 1992, the *Orlando Sentinel* revealed that Volusia County Sheriff Bob Vogel had created a special police drug squad which preyed upon thousands of innocent motorists driving on U.S. Interstate 95. Operating under a broadly written Florida law allowing police seizure of cash and property based on probable cause without arrests in suspected felony cases, the police engaged in pure highway robbery.

Police conduct was guided by no written rules and reviewed only by the sheriff, who controlled all funds confiscated. Any motorists stopped who had $100 or more in cash were assumed to be a drug trafficker, and their money was taken. From 1989 until the bad publicity in 1992, the squad seized more than $8 million in cash from motorists, mostly blacks and Latinos, and in only four cases did the innocent owners get all their money back.

Nashville. In 1991 Willie Jones, a legitimate businessman, was stopped when he paid cash for a plane ticket to Houston at the Nashville Airport, losing $9,600 in cash to Drug Enforcement Administration agents (which a federal judge eventually ordered returned). Paying in cash and being an African American are both factors in DEA "profiles" used to spot potential drug traffickers at public transportation hubs, especially airports. In 1992, *60 Minutes* reporters checked out these DEA airport operations in New York, Atlanta, and other cities, by having a well-dressed

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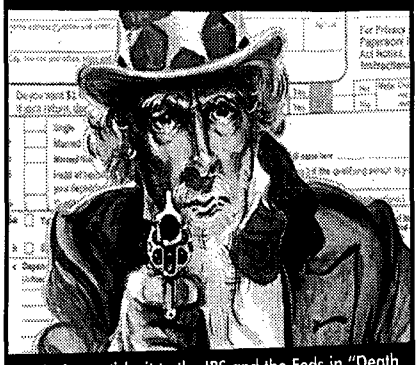

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black male undercover reporter buy a plane ticket with cash. Within minutes of each purchase, DEA agents accosted the black reporter and confiscated all his money.

Hudson, New Hampshire. The Supreme Court has ruled that in order to fulfill the "particularity" clause of the Fourth Amendment, a police search warrant must be based on the most recent available information. At 5 a.m. on August 3, 1989, police came to the home of Bruce Lavoie, 34, a machinist with a wife and three children. Without announcing themselves and with no evidence that Lavoie was armed, police smashed the door in with a battering ram. They had a search warrant based on an informant's tip that was 20 months old. As he arose from his bed, Lavoie was shot to death as his son watched. A single marijuana cigarette was found.

Ruby Ridge, Idaho. After 18 months of FBI surveillance of his family's isolated cabin in the Idaho mountains, six armed, camouflaged U.S. marshals sneaked onto the land of Randy Weaver on August 21, 1992. Weaver had been charged with selling illegal firearms to an undercover agent. In the ensuing 11-day siege, Weaver was wounded and his wife and 14-year-old son were both shot to death. His wife was holding her 10-month-old daughter in her arms when she was murdered. More than 400 police agents were involved in the raid. A federal judge found Weaver and the others innocent of all charges and condemned the FBI for its actions. The FBI announced after a two-year investigation that no agents would be fired or severely punished for their part in this lethal fiasco.

San Diego County. On the night of August 25, 1992, in Poway, California, U.S. Customs Service and heavily armed DEA agents broke down the door of Donald L. Carlson's suburban home. Aroused from sleep and thinking a robbery was under way, Carlson grabbed a gun as the agents lobbed a percussion grenade into his home. In the ensuing exchange of gun fire, Carlson was hit three times, in the arm, lung, and femoral vein.

After three weeks on a ventilator in intensive care, he was lucky to be alive. He suffered life-long diaphragm paralysis, chronic pain, and circulatory problems. There were no drugs in Carlson's house, he had no criminal record, and he is a vice president of a *Fortune* 500 company and a respected family man. But Carlson was fingered falsely by a paid informer known only as "Ron," who already had been kicked out of one federal anti-drug program because of two other false reports, one fingering a vacant house. Carlson has filed suit for damages and alleges a government conspiracy to cover up the Customs Service blunder. No one has been charged with any wrongdoing as a result of this tragedy.

"Testilying" is a routine police exercise that occurs without sanction from prosecutors or judges, who often cooperate in the charade by not challenging officers who tailor testimony to meet search-and-seizure constitutional objections.

Malibu. October 2, 1992, dawned as another peaceful southern California morning at Trail's End Ranch in the Santa Monica mountains overlooking the Pacific Ocean at Malibu. Peaceful until the ranch owners, 61-year-old retired millionaire Donald Scott and his wife Frances, were jolted awake by the terrifying sound of a 27-man police task force smashing through the front door of their rural home. Frances Scott, racing downstairs and confronted by a house full of men with guns drawn, screamed in panic: "Don't shoot me. Don't kill me." Don Scott responded, holding his legal handgun above his head as he rushed to the top of the stairs. He was ordered to lower the gun and as he obeyed, Scott was shot to death by Gary Spencer, the Los Angeles County deputy sheriff who led the raid.

As in thousands of similar "drug" raids in America, the police wanted to surprise the Scotts, whom they suspected of growing marijuana based, as it turned out, on an informant's false information. After a five-month investigation of Scott's death, the Ventura County district attorney, Michael Bradbury, concluded police not only lacked evidence of drugs, but had obtained the search warrant by lying to the judge who signed it.

Not content with the expanded power to search and seize the Supreme Court has granted police, four cases are now on appeal from state courts attempting to overturn the 400-year-old common law "knock and announce" rule. That rule requires police conducting a raid to knock and announce their identity and purpose, allowing sufficient time for the homeowner or occupant to respond. Courts, including the Supreme Court, have held this practical rule protects privacy, reduces the risk of violence, prevents property destruction, and gives innocent people a chance to correct police mistakes. Police counter that it allows time to flush drug evidence down the toilet and to use guns or other weapons. They contend the rule should be abolished.

There is nothing conservative about attempting to reestablish in America the police tactics of King George III. Those tactics are the reason the Fourth Amendment exists, and the reason it needs to be preserved. For the sake of gaining and keeping power, Republicans seem willing to promise segments of their coalition whatever they demand in terms of appearing "tough on crime," at whatever cost to the rights of others. In this respect, conservatives have become a grotesque companion to liberals, filling in the gaps of state power that liberals have left empty.

Robert Bauman, a Republican member of the U.S. House of Representative from 1973–81, is an attorney and writer living in Florida. He is a former national chairman of both the American Conservative Union and the Young Americans for Freedom.

Up the Academy

By John Hood

Clinton's college-aid hikes would help schools, not students.

College students: Trapped on a government-sponsored cost escalator.

GARY A. CONNER, UCLA PUBLIC INFORMATION OFFICE

On Valentine's Day, President Clinton spoke to an audience in San Francisco that had every reason to love him: the American Council on Education, the chief lobbying organization for the nation's colleges and universities. Just a month before, in his State of the Union message, Clinton had pitched several ideas—such as expanding the federal Pell Grant and direct student-lending programs and making college tuition expenses of up to $10,000 deductible for families making under $100,000 a year—that higher education leaders absolutely adored.

Clinton had chosen the ACE meeting to draw a line in the sand. The Republican Congress, he said, just wants to "cut and gut" government aid to higher education, perhaps even eliminating the Department of Education altogether. "I want you to know that to all of this, I will say no," the president promised. "I will fight these proposals every step of the way."

The crowd cheered. As well they should. Despite the talk of helping struggling families afford higher education, Clinton's policies, if enacted, will actually make it easier for colleges and universities to charge students more and more for tuition and other costs.

Paying more for college is, of course, something that people have almost come to expect. Tuition and fees for higher education have been going up for years. In the decade between 1983–84 and 1993–94, average tuition, room, and board for all institutions of higher education rose by a third in real terms; the price of private schools increased by 44 percent during the same period.

Not surprisingly, students and parents complain about how far into debt they must go to pay for school. Personal finance magazines are filled with articles on how to save for a child's college education. College administrators, waxing sympathetic, beg for more aid from Congress and state legislatures.

Interestingly, those same administrators, along with policy makers and the media, rarely try to explain *why* college costs are rising. Is land for new classrooms that much more expensive? Is there a shortage of people becoming professors, bidding up the wages of those currently in colleges and universities? Do books cost more than they used to? The short answer is maybe—but the cost increase in higher education far outpaces increases in any of those expenditures.

In fact, the cost of higher ed is rising because there isn't a true market for students. Governments, both federal and state, subsidize colleges and universities—even private ones—so heavily that tuition and fees have only the murkiest relationship to the costs of providing higher education. The "costs" themselves are essentially arbitrary.

Much like the cost-plus system of paying for health care, in which third-party payers such as insurers now cover most of the immediate cost of consuming medical services, the system we use to finance higher education encourages the expansion of noninstructional staffing and nonessential physical plant, rewards colleges for hiking tuition, and pushes many students into academic environments for which they are unprepared. Rather than boosting federal financial aid by 15 percent to $40 billion, as Clinton's budget proposes, Congress should consider whether *any* financial aid really serves the public interest.

Higher education is a huge commercial enterprise, made up of some 3,600 public and private colleges and universities spending about $160 billion a year and employing over 2.5 million people. Almost 50 percent of this industry, however, is financed directly by federal, state, and local governments, including direct appropriations, research grants and contracts, and Pell Grants for students. In the 1989–90 academic year (the latest data available from the Department of Education), 30 percent received federal grants averaging $1,770.

The actual role of government is even larger than that, however, because of the DOE's role in subsidizing and guaranteeing student loans. The government pays the interest on such loans for as long as the student is enrolled full time and subsidizes the interest rate for as long as the debt is outstanding. During 1989–90, about 28 percent of full-time undergraduates participated in one of several federal student loan programs, receiving on average about $2,660. Including work-study and some other assistance, fully 42 percent of all full-time college students got an average of $3,511 in grants and subsi-

dized loans from the federal government. Compare that to the average cost of tuition, room, and board in American colleges and universities that year: $6,207.

Private institutions, of course, get less of their money from the government than do public institutions, but not by as much as you might think. Direct support, including Pell Grants but excluding other government student aid such as loans, made up over 20 percent of private schools' revenue in 1989–90 (the figure for public schools was 55 percent). And students at private schools are even more likely than their public counterparts to receive government grants and loans, no doubt because the nominal tuition they pay is much higher.

WITH A POT OF GOVERNMENT MONEY SITting out there waiting to be tapped, there's a strong incentive for college administrators to raise tuition. Consider how financial aid works: The federal government awards student aid according to how much a student's tuition and fees exceed his or her "expected family contribution"—a figure calculated from family income and assets, the number of children, and other measurements. Since a college or university knows the average expected family contribution of their student body, it makes sense for administrators to boost their charges above that amount—thus making more students eligible for aid. Families will pay more, but a good portion of the tuition hike will be picked up by the government. Hence, colleges and universities can get more money for providing exactly the same service.

Administrators, of course, make the opposite argument about government aid and tuition. They say that colleges and universities have had to hike tuition to make up for *cuts* in federal and state assistance. While this argument plays well in soundbites, the actual record of the past two decades makes it difficult to swallow.

During the 1970s, the real-dollar value of government assistance to higher education, adjusted for the number of full-time students, fell slightly. So did real tuition, room, and board charges for both public and private colleges. Throughout the 1980s, however, government assistance per full-time student rose significantly (10 percent, not including loans), accompanied by a 27 percent real rise in public college charges and a staggering 50 percent real rise in private college charges. College and university revenue from Pell Grants rose by more than 25 percent from 1985–86 to 1991–92; revenue from state-level need-based grants rose by about 15 percent, even as colleges were complaining of massive cutbacks in government aid. In short, administrators' claims that a drop off in government aid necessitated tuition hikes are untenable—they run counter to both the available evidence and basic economic theory.

The federal government awards student aid according to how much a student's tuition and fees exceed his or her "expected family contribution." Since a college or university knows the average expected family contribution of their student body, it makes sense to boost their charges above that amount—thus making more students eligible for aid.

This is the context in which Clinton's proposals on higher education finance should be examined. His suggested expansion of the Pell Grant program means more money for colleges to spend hiring nonteaching staff, building monuments to academic extravagance, and subsidizing college athletics (yes, all but a handful of NCAA teams lose money for their universities).

Clinton's proposal to expand direct lending is more complicated. The system it would replace—government guarantees of loans by private banks—is itself horribly flawed. The largest federal loan program, the Stafford Loan, was created in 1965 and, until recently, provided four out of every five student-loan dollars nationwide. The Stafford program gives private lenders a "special allowance," set 3.1 percentage points over the 91-day Treasury bill rate, to pay for the interest on loans issued to college students.

Stafford loans are insured against default by a guaranty agency and reinsured by the federal government. If a student defaults and the private lender fails to collect the debt, it is fully reimbursed by the guaranty agency, which, in turn, is fully compensated by the federal government if *it* fails to collect the unpaid balance. Not surprisingly, few participants in this process have any incentive to reduce defaults, which occur about one-fourth of the time.

The selling point of Clinton's direct-lending scheme, passed as a pilot program last year, is that it would eliminate the private middlemen and have the Education Department issue loans directly to students. The administration claims this will save the government billions of dollars a year, but we won't be able to gauge that for another six to eight years, when the loans start to come due. Without waiting for the results of this experiment, Clinton wants to increase dramatically the number of loans directly issued by Washington.

The payoff of direct lending may not be known, but we can guess using common sense: Why should we expect the federal government to be a better lender than a private bank? Indeed, when the Senate Subcommittee on Investigations for Governmental Affairs investigated the Education Department's handling of student loan-guarantee programs a few years ago, it found that the DOE "failed to efficiently or effectively carry out its responsibilities....It is not an exaggeration to say that we have heard no testimony or seen any document that suggest that the Department of Education has done even an

adequate job in managing and overseeing its student loan responsibilities." Giving the department more responsibility is not likely to improve this sorry record.

IT IS PROBABLY TRUE THAT, FEDERAL LOAN programs or no, the vast majority of students would still need to borrow some money to attend college. I see no reason why these loans shouldn't be made by private lenders who, without government guarantees, are simply making a business decision to invest in the future earning potential of students.

Would the lack of government guarantees mean that the market in student loans would completely dry up? It's unlikely. Banks, after all, make money by lending, and the fact that the overwhelming majority (more than 75 percent) of student loans are repaid on time indicates that promising students are good risks.

The withdrawal of federal guarantees would force lenders to seek out students (or students' parents) who are likely to repay their loans. If private lenders prove reluctant to reenter the market for student loans, colleges and universities could prime the pump by making loans themselves and then selling the loans on secondary markets for maintenance and collection, as some private colleges already do today. Or schools—who have more ready information about their students than banks are likely to—could simply make loans themselves, earning interest on their endowments while funding their students.

This shift to private-sector lending wouldn't mean that only accounting and engineering majors would get loans. A responsible student majoring in an "impractical" subject—say, art history—may be a better risk than a less-devoted student working toward a "practical" degree.

Clinton's plan to make tuition payments tax deductible seems less objectionable on face value. But simply making tuition tax deductible, the Clinton approach would still artificially encourage families to buy higher education rather than other goods and services, leaving colleges and universities with no strong incentive to deliver more bang for the education buck.

As Clinton was inside San Francisco's Hyatt Regency Hotel that February 14, whipping lobbyists for higher education largess into a frenzy, several hundred people protested outside the hotel against Clinton's multibillion-dollar loan-guarantee plan for the Mexican peso. Why should we back loans so risky that banks won't make them? the demonstrators argued. In a few years, if Clinton's college aid plan makes it into law, we may well have another loan-guarantee fiasco to worry about.

Contributing Editor John Hood is on leave from the John Locke Foundation in North Carolina and is currently a Bradley Fellow at the Heritage Foundation.

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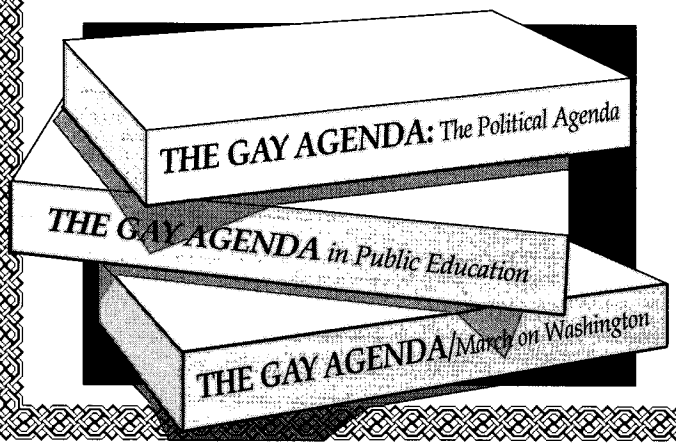

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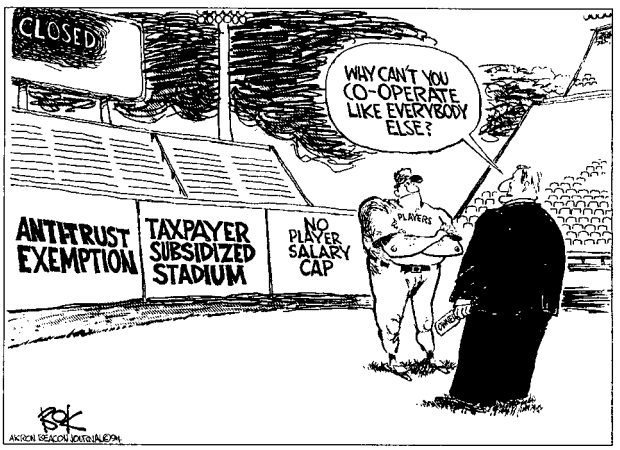
Fehr Ball

By Michael McMenamin

The bush-league strategy of baseball's player rep



NEWT GINGRICH, SPEAKER of the House of Representatives, and Donald Fehr, executive director of the Baseball Players Association, have exactly two things in common: Both are out of shape and both favor a repeal of baseball's antitrust exemption.

That's where the similarities end. Gingrich is dead right on how baseball should solve its problems. He believes that a negotiated settlement at the bargaining table "would be infinitely preferable to some politician rigging some excuse to coerce people into doing something."

Fehr, by contrast, is wandering out in left field. Fehr wants someone, *anyone*—President Clinton, Congress, the National Labor Relations Board, the courts—to step in and save him from the consequences of the botched strike for which he alone is responsible.

Fehr is the subject of derision and ridicule when labor leaders or their management counterparts gather behind closed doors. Experienced lawyers for union and management feel the same way. Why? Because Fehr committed a cardinal sin for labor leaders: He took his people out on strike without a viable backup plan for getting them back to work if the team owners didn't fold. As a result, the players will *never* make up in future salaries what they lost during the strike.

Almost all strikes occur because one side has misinterpreted the resolve of the other. But experienced labor leaders, which Fehr is not (more on that later), narrow the differences between the parties as much as they can *before* resorting to their ultimate weapon—the strike. They resort to a strike because they believe that management underestimates their resolve. Sometimes they're right and management *has* miscalculated the union's resolve. If so, a strike can bring a quick resolution on more favorable terms for the union.

Fehr certainly expected this to happen with baseball, and he had history on his side. In the past, team owners either caved or had baseball's commissioner impose a settlement. But most labor leaders have a contingency plan, a face-saving way for a quick settlement, should the strike not produce the desired result within a relatively short period, say, two to four weeks maximum. Fehr didn't have a legitimate backup plan.

WHEN THE TEAM OWNERS DIDN'T FOLD and the World Series was cancelled, an experienced labor leader would have gone back to the bargaining table to take as much as he could get. The baseball owners were offering a salary cap with a 50-50 split of revenue. Fehr could have asked for a 60-40 split and gradually bargained down to a 55-45 split. That would be a better split than the 53 percent the players get in the salary-capped National Basketball Association, which is considered by many as the model of a successful sports industry for players and owners alike.

But Fehr isn't really a labor leader. He's a lawyer. And there's the problem. While some lawyers may be good negotiators, Fehr isn't one of them. He's never actually brokered a contract without outside intervention. So instead of negotiating a deal, he engaged in ad hominem attacks on the owners and spouted nonsense about opposing a salary cap because he wanted the "free market" to set salaries for players. But that is precisely the opposite of what trade unions stand for. If you want the free market to set salaries—which is how most Americans have their incomes established—then you don't need a union.

The basic goal of a union is to eliminate labor costs as an element of competition among companies in a particular industry. That is why the country's labor laws encourage multi-employer bargaining—many companies in the same industry sitting down with the same union to negotiate wages. Like trucking companies, the garment industry, printing companies...and sports teams.

It is now painfully clear that the only strategy Fehr has for achieving what he abysmally failed to accomplish at the bargaining table is litigation or the threat of litigation. This is where baseball's antitrust exemption fits into Fehr's strategy. Fehr has long misled the media and politicians into believing that if baseball were covered by antitrust law, the team owners would not be able to stonewall the players, insist on a salary cap, or even hire replacement players, because the union could file an antitrust suit. This is nonsense. Baseball doesn't need an antitrust exemption for the team owners to continue doing precisely what they are doing today with respect to the players.

Contrary to Fehr's claims, if Congress repeals baseball's antitrust exemption, the

CHIP BOK

players' union will *not* be able to successfully sue the team owners for antitrust violations. Why not? Because, like the National Football League, the National Basketball Association, and the National Hockey League, Major League Baseball enjoys a nonstatutory labor exemption from the antitrust laws, as does any other industry in this country with a history of multi-employer bargaining.

To its dismay, the National Basketball Players Association found this out earlier this year, when the U.S. Court of Appeals for the Second Circuit in *NBA v. Williams* ruled that the players' association could not maintain an antitrust action against the NBA even though, as in baseball, the NBA's labor agreement with its players had expired, and the parties were at an impasse in their negotiations over, among other things, a salary cap. The U.S. Court of Appeals affirmed a lower court decision which held that "the Players may not have it both ways. They may not avail themselves to the benefits of federal labor and antitrust laws at the same time."

Plainly put, as long as the baseball players' union remains in the picture representing the players, then no antitrust suit can be successfully maintained against the team owners. Period. End of story.

So why does Fehr want an end to baseball's antitrust exemption and why has he offered to have the players return to work if the exemption is repealed? There are two reasons, and both tie into lawyer Fehr's reliance on litigation or the threat of litigation.

First, Fehr needs a fig leaf to camouflage his failure. Ending baseball's antitrust exemption will give him that fig leaf. If the antitrust exemption were repealed, he can declare victory and go home, even though the players' economic strength will have been greatly diminished.

Second, repeal of baseball's special antitrust exemption will give Fehr a litigation weapon he does not have today. But to use it, he will have to disband his union. Without its antitrust exemption, baseball will be no different from any other professional sport. If the union is no longer representing the players in multi-employer bargaining with the owners, then the team owners may not act together in dealing with their players without violating the antitrust laws. To take advantage of this, however, the Baseball Players Association must "decertify" as the players' union, so there is no collective bargaining unit left in the picture. This is what the NFL Players Association did several years ago. The players then filed and won a protracted antitrust case against the NFL and damages were awarded to many NFL players. After the litigation, the NFLPA returned as the union for the players and negotiated a new collective bargaining agreement—with a salary cap.

Fehr committed a cardinal sin for labor leaders: He took his people out on strike without a viable backup plan. As a result, the players will *never* make up in future salaries what they lost during the strike.

Antitrust litigation or litigation before the National Labor Relations Board is the only leverage Fehr has left. But such a course will involve years of lengthy litigation where Fehr and his fellow lawyers will end up making more than most of the baseball players they used to represent. In the meantime, while the litigation is pending, the baseball players will be at the mercy of the individual team owners and will have to rely on the free market to set their salaries.

So, end the antitrust exemption. Give Fehr his fig leaf. As long as the players return, and the World Series commences this October at Jacobs Field in Cleveland, the fans couldn't care less about how a bunch of millionaires go about deciding how to split up their profits.

Contributing Editor Michael McMenamin is an employment lawyer in Cleveland.

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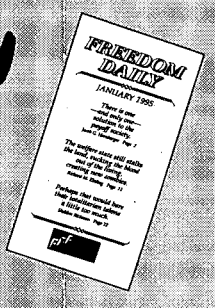

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Victimful Crime

By Cathy Young

It's All the Rage: Crime and Culture, by Wendy Kaminer, New York: Addison-Wesley, 285 pages, $22.00

Wendy Kaminer: Victims don't have rights, since the state isn't threatening their liberty.

WHAT BETTER TIME TO PUBLISH A book on the state of American justice than in the midst of the most-watched criminal trial of our time, which caps a whole series of bizarre and sensational cases and coincides with a heightened national concern about the crime problem?

In her new book *It's All the Rage: Crime and Culture*, lawyer and author Wendy Kaminer notes that public outrage at crime and at excuses for criminals coexists with frequent sympathy for individual defendants. Some of the same Californians who lauded Gov. Pete Wilson's calls for tough-on-crime laws, Kaminer speculates, may have been in the crowd cheering O.J. Simpson—the prime suspect in a double murder—during that infamous slow-speed chase: "It was easy to imagine a demonstrator holding a sign saying 'Three strikes you're out' in one hand and 'Free the Juice' in the other."

To Kaminer, this dissonance epitomizes the irrationality of our approach to justice. Ordinarily, our revulsion at a brutal crime leads us to label the perpetrator inhuman and to demand his death. But since O.J. is someone many people "loved," the emotion was on his side.

Picking up on the theme of her acclaimed bestseller *I'm Dysfunctional—You're Dysfunctional*, Kaminer looks at how the basic motifs of the recovery movement—everyone's a victim of abuse, shame and guilt are "toxic"— have influenced the legal process. Juries are now likely to "include people who watch talk shows and have been encouraged not to judge the self-proclaimed victims of addiction and abuse simply because they've engaged in bad behaviors"—the Oprahization of justice, as it were.

Both conservatives and anti-victimhood liberals such as Kaminer and Alan Dershowitz have deplored the tendency to bring the "personal development" mentality, with its scorn for individual accountability, its claims that we are all victims, and its emphasis on subjective feelings, into the legal process. But Kaminer argues that some of the same characteristics—the obsession with victimhood, the emotionalism, the blurring of lines between justice and therapy—are also evident in the law-and-order revolt and in the victims' rights movement: "From the victims' perspective, the trial is, in part, a therapeutic process. They seek 'healing' in the resolution of the case, which seems appropriate to the citizenry of a therapeutic culture." Conservatives, generally so contemptuous of the therapeutic culture, happen to approve.

This startling charge certainly deserves to be considered seriously. But is it fair? The "healing" element of righting wrongs has always been present in the concept of justice, and the victims' rights perspective demands precisely what the therapeutic culture denies: personal accountability.

What troubles Kaminer about the push for victims' rights is not the demand for better services for crime victims but the pressure to give them "power to help determine the disposition of cases." She is right, of course, to warn against "allowing feelings about the victim to displace facts about the defendant's culpability"; the parent of a murdered child may well be unable to appreciate the need to prove guilt beyond a reasonable doubt.

But despite a few extreme voices, such as the slain policeman's mother who dismisses fears about executing an innocent man by stressing that her son was also innocent, how many victims' advocates want to use the law for "healing" regardless of the defendant's culpability? A parent whose child is run over by a car while jaywalking feels the same loss as the parent whose child is killed by a mugger, but surely no one would call for the same punishment in both cases. The linkage of punishment to guilt is also the difference between vengeance and retribution.

TO KAMINER, SETTING UP VICTIMS' RIGHTS as a counterpart to defendants' rights is dangerously misguided: "Victims have moral claims to be treated fairly, with sympathy and respect, but they don't have rights, exactly, because they're not being prosecuted: the state isn't threatening their liberty." The distinction, she concedes, is likely to be lost on contemporary Americans who, unlike the framers of the Constitution, fear crime more than they fear the state.

Certainly, there is danger in this trend, which may also be related to the fact that Americans have been taught to fear all sorts of private wrongdoers—biased employers, greedy landlords—more than the state. The alarming authoritarian elements in the anti-crime backlash were evident in the response to the caning of Michael Fay in Singapore for spray-painting cars: As Kaminer observes, the pro-caning cheerleaders were remarkably unconcerned not only about the cruelty of the punishment but about the possibility that Fay was coerced into a false confession.

The rhetoric of victims' rights may, as

LILIAN KEMP

Kaminer suggests, reflect the tendency to elevate everything people feel they deserve to the level of a "right." But it is worth noting that this rhetoric emerged in the context of a widespread sense that the state was defaulting on its obligation (recognized by the Founding Fathers as a key function of government) to protect citizens from crime, and of a dramatic expansion of defendants' rights. Traditionally, the collective interests of community and state are pitted against the individual rights of the defendant (and, as Kaminer reminds us, "communities don't have rights under our constitution"). The push for victims' rights is a reminder that there are individuals at the other end, too.

Much of *It's All the Rage* is devoted to the capital punishment debate. Kaminer's stated goal is to "rationalize" the discussion, and while her anti–death penalty sympathies are clear, she does not portray all death penalty proponents as vengeful racists or all abolitionists as thoroughly unblemished. Describing a group of murder victims' relatives opposed to capital punishment, she obviously admires their willingness to go against the grain but does not conceal her irritation with their lapses into sentimentalism about the "warm, tender human beings" on death row ("I found myself longing for less love and a little brimstone").

Many of Kaminer's arguments against the death penalty are familiar: It does not deter crime; it will result in the execution of innocent people. Above all else, it cannot be enforced fairly in a society riddled with racial and class inequalities: "Incompetent and untrained defense counsels are routinely assigned to represent indigent defendants on trial for their lives," she writes.

If most people knew how capriciously the death penalty is applied, and if life imprisonment were a reliable alternative, Kaminer suggests, public support for capital punishment might lose much of its steam. But she is far from confident on this point, citing polls in which, given a choice between capital punishment and life without parole, solid majorities continue to back executions. This holds even though most Americans agree that the death penalty is disproportionately applied to the disadvantaged. As Kaminer acknowledges, people may think that too few privileged killers are executed, not too many underprivileged ones. So why do Americans continue to support the death penalty? She returns to her theme of inadequate knowledge: "Assertions about the value of capital punishment or the fairness of the system aren't subjected to much reality testing by the public."

Many of Kaminer's arguments against the death penalty are familiar: It does not deter crime; it will result in the execution of innocent people. Above all else, it cannot be enforced fairly in a society riddled with racial and class inequalities.

THAT MAY BE TRUE. BUT KAMINER'S analysis is hampered by the virtual omission of the concept of retribution. Occasionally, she even refers to the desire to see criminals punished severely as "vengeance." (The excellent book *Wild Justice: The Evolution of Revenge* by Susan Jacoby, an anti–death penalty liberal who sees retribution as an essential element of justice which we deny at our peril, is cited in the notes to *It's All the Rage*. But it is not at all clear whether Jacoby's argument for the legitimacy of the retributive impulse is incorporated into Kaminer's thinking.)

Kaminer is clearly impressed by former prosecutor Bob Wilson, who reluctantly supports the death penalty not as a solution to crime but as "an occasional affirmation of the moral order." Yet she finds his argument—like Walter Berns's evocation of "the poetic justice handed out to Macbeth" as an example of the morality of capital punishment—utterly divorced from the reality of executions. The justice system, she says, is bureaucratic more than poetic; the inmates are no Macbeths but "damaged and crazy" or "inexplicably cruel" people. The image she dwells on is Ricky Ray Rector, left brain-damaged by a suicide attempt, saving his dessert for later as he shuffles off to execution. But isn't that stacking the deck a bit? Typical death row inmates are no Macbeths, but no Ricky Ray Rectors, either.

Kaminer is equally and often deservedly critical of other get-tough responses to crime such as mandatory minimum sentences in drug cases, the rush to federalize every "crime of the week," and the application of "three-strikes-you're-out" laws. She is similarly skeptical about the liberals' favorite symbolic solutions such as gun control.

Seeking to place the crime debate into a broader cultural context, Kaminer looks at "virtue talk"—the discussion of crime and character. In an acutely felt moral vacuum, she finds, many start looking to the justice system to "restore an uncomplicated moral order." At the core of this expectation she sees a paradox: Virtue implies moderation, yet our society has "immoderate, immodest notions of criminal justice," insisting on absolutes of innocence and guilt. The much-talked-about crisis in accountability is not simply that we refuse to judge people but that we "alternate between judging too harshly"—in cases of obscure defendants whose punishment is not mitigated by backgrounds of dreadful abuse—"and not judging at all," as in famous recent abuse-excuse cases: "We want people to be either victims or victimizers, without recognizing that many of us are both, without knowing how to punish guilty victims."

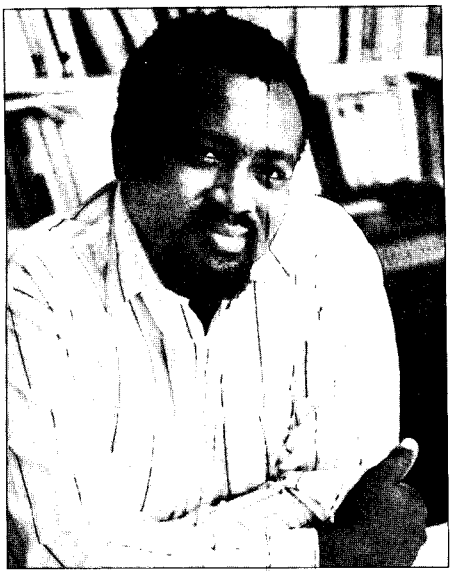
To Kaminer, a Lorena Bobbitt can be a victim and yet be guilty; a history of abuse can be invoked to modify the sentence, not to exonerate the accused. "This," she writes, "is not moral relativism but moral modesty; it assumes the existence of right and wrong but questions our capacity to choose with unerring accuracy between

the two."

The idea is provocative though open to challenge. For instance, the deadlocked Menendez jurors might have argued that they were striving precisely for "moral modesty," using the putative history of abuse not to acquit but to convict on lesser charges. Unfortunately, we get little indication of how such a stance would be applied in actual cases. Would absolute judgments *ever* be appropriate? If the Menendez brothers did suffer physical, psychological, and sexual torture at their parents' hands, that abuse might shade, though not negate, their accountability. But suppose they just killed for the money. Then what?

In the spirit of moral modesty, Kaminer is more interested in questions than in answers. There's nothing wrong with that. But in this case, it gives the book a tentative quality that can become frustrating. *It's All the Rage* lacks the verve of *I'm Dysfunctional, You're Dysfunctional*, perhaps because in the earlier book Kaminer had a subject she didn't feel ambivalent about. *It's All the Rage* is fascinating at times, particularly when dealing with people personally involved in the legal system. It offers many fresh insights (e.g., that fear of criminals is a far stronger reason for people's attachment to the right to bear arms than fear of a tyrannical government) but often seems to lack a unifying thread. In the end, one is left with the feeling that the debate about crime, justice, and culture is much where it was before.

Contributing Editor Cathy Young is author of the forthcoming book, Gender Wars, *to be published by The Free Press.*



Glenn Loury: A vision of redemption for the black community that embraces both self-help and state aid.

Race and Responsibility

By Errol Smith

One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America, by Glenn C. Loury, New York: The Free Press, 324 pages, $24.95

THE GREAT WRITER JAMES BALDWIN once observed, "Not everything that is faced can be changed, but nothing can be changed until it is faced." But coming face to face with long-standing, unresolved issues of race remains a prospect that, for most Americans, whether white or black, causes considerable anxiety. Making these encounters even more distressing is a climate of political rectitude that persistently seeks to define the legitimate parameters of thought and speech on contemporary issues of race.

Whites and blacks are supposed to work things out, goes this line of thought, but certain topics are deemed too sensitive for mixed company and certain experiences can never be shared anyway. This orthodoxy, of course, only makes matters worse. It means that new ideas and solutions are beyond discussion even as the growing intractability of black poverty, the disproportionate rates of black out-of-wedlock births and black incarceration, and other race-sensitive problems demonstrate the failure of conventional thinking on these issues.

Glenn C. Loury, professor of economics at Boston University, ventures into this troubled milieu and shows no fear of engaging many of our nation's most sensitive and divisive racial issues (including the recent controversy over Richard J. Herrnstein and Charles Murray's *The Bell Curve*). *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America* takes a long, critical look at the methods by which we might genuinely achieve equality for black Americans in the post–civil rights era. Loury touches on the ascendant issues of African-American life: the dubious blessing of racial preferences, the dual identity of African Americans, the conflict of racial loyalty and intellectual independence, the family crises, and the vacuum of genuine black leadership.

One by One opens with a discussion of the "authenticity dilemma" faced by many African Americans: having to choose between living a life that will qualify one to be deemed "genuinely black" by other members of the black community and maintaining a sense of personal integrity. Loury points out that this conflict arises from the struggle to meet the demands of a "socially imputed" definition of what a black man or woman is "supposed to be" when that definition conflicts with the very personal definition of who one is as an individual.

Loury writes memorably of an early experience in his life which forced him to confront this question. When he was 18, he attended a political rally with Woody, his "best friend since Little League." The rally was a call to action against some "pending infringement of the white power structure" and those attending were prepared to resist by any means necessary.

Although Woody was among the most passionate there that day, he had a prob-

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lem: "Though he often proclaimed his blackness, and though he had a Negro grandparent on each side of his family, he nevertheless looked to all the world like your typical white boy. Everyone, on first meeting him, assumed as much," writes Loury.

Woody's family, which had passed as white before the neighborhood became integrated, stayed on as the area went black, electing "to stay and raise their children among 'their own kind.'" But because some of Woody's relatives were passing as white, racial authenticity was a particularly compelling issue for him. "He desperately wanted to be black," Loury writes, "but his peers in the neighborhood would not let him."

At the rally, Loury faces a moment of truth: "Woody had an idea, and enthusiastically raised his voice above the murmur to be heard. He was cut short before finishing his first sentence by one of the dashiki-clad brothers-in-charge, who demanded to know how a 'white boy' got the authority to have an opinion about what black people should be doing. That was one of our problems, the brother said, we were always letting white people 'peep our hole card,' while we're never privy to their deliberations in the same way."

Loury tells us, "A silence then fell over the room. The indignant brother asked if anyone could vouch for this white boy." Loury refused to speak up for Woody, who was subsequently asked to leave. Loury had compromised his friendship and his integrity in his desire to be accepted by the "authentically black" crowd. Only later in his life would Loury examine how this desire for "certification" had dramatically altered his intellectual and social pursuits, distorted his relationships, and censored his political thought, expression, and cultural interests.

By exploring his experiences, Loury examines the demands of being a genuine "brother." He writes that authenticity is based on the premise that being "really" black "involves in some elemental way seeing one's self as an object of mistreatment by white people, while participating in a collective consciousness of that mistreatment with other black people." Said more directly, being genuinely black means intimately linking one's personal identity with victimization.

While never ignoring the implications of growing up "black" in America (and pointedly eschewing "the libertarian ideologue's rhetoric about the glorious individual who, though put upon by society, blazes his own path"), Loury insists that the collective black experience of victimization is not the most significant aspect of his personal identity. He is adamant that he is "much more than the one wronged, misunderstood, underestimated, derided or ignored by whites."

ULTIMATELY, WHAT LOURY PRIZES MOST is the right to define himself in broad, overlapping terms. For him, "self-definition" and "self-certification" are more important than receiving a stamp of approval from self-righteous, self-proclaimed arbiters of black authenticity. So who is Glenn C. Loury? He is "a child of God...a husband, a father, a son, a teacher, an intellectual, a Christian, a citizen." In none of these roles, he writes, "is my race irrelevant, but neither can racial identity alone provide much guidance for my quest to discharge these responsibilities adequately." Stressing that "racial conditions" are secondary to "human conditions," he argues cogently that to base personal identity primarily on racial contingency—something that both whites and blacks do—tragically limits our conception of what is possible and desirable.

Loury's thoughts on the authenticity dilemma set up the heterodox philosophical essays and reviews that fill out the rest of *One by One*. As in his analysis of identity politics, he is consistently nuanced, challenging, and probing.

In discussing the civil rights movement, for example, Loury asserts that its greatest challenge is to redefine an agenda suited to the "sociopolitical realities of the 1990s and beyond...and that this redefinition should be centered around an effort to...mitigate the worst conditions of lower-class black life." He quickly acknowledges that "many of the problems of contemporary black American life lie outside the reach of effective government action and require action that can only be undertaken by the black community itself."

But Loury's analysis goes far beyond simplistic notions of "self-help." He argues that fault and responsibility do not necessarily go hand in hand. "It is absolutely vital that blacks distinguish between the fault which may be attributed to racism as a cause of the black condition and the responsibility for relieving that condition," he writes. Loury is correct in insisting that no people can genuinely be free if they believe their freedom must be delivered to them by others.

Fostering the commitment to the notion of self-help is a responsibility he places squarely at the doorstep of the established black leadership. He is justly critical of the inclination among black political, intellectual, and religious leaders to finger the "racist American society" for the general condition of the black underclass. Furthermore, he berates the notion that the problems of black poverty, unwed black teenage parents, and black crime will miraculously disappear when America "finally does right by its black folk." Loury persuasively argues that these positions dodge both the responsibility of individuals for their behavior and the responsibility of groups for the values embraced within a given community.

AS A PRAGMATIC MATTER, SAYS LOURY, any effective response to the problems of black Americans requires the "intimate involvement" of black institutions, black politicians, black educators, *and* black individuals. At the same time, however, Loury draws the line at asserting a race-specific collective responsibility for the black underclass. Rightfully so. It is generally accepted that a civilized society assists its members who cannot do for themselves, but to assign a race-specific onus to all black Americans smacks of a racial or cultural determinism that seeks to dictate behavior on the basis of group membership instead of individual free will.

Still, Loury seems to believe—and I agree with him on the point—that the black civil rights establishment, which has effectively monopolized leadership in the black community, has a special responsibility for the current decrepit state of individual values. By focusing almost exclusively on external contributors to the plight of the black underclass, organizations such as the NAACP and the Southern Christian Leadership Conference have helped erode black communities' historical commitment to self-reliance. As a result, we have now created an entire generation of black men and women who are convinced they can do little to improve their condition until white America changes.

Loury is aware of the political and social realities that inhibit black leaders from openly criticizing black behavior and he's afraid of "aiding and abetting" those who would use such critiques to advance racist notions of black inferiority. But he insists that the stifling of discourse has the much more deleterious effect of hindering development of new approaches to resolve the black community's increasingly intractable problems.

Hence, Loury welcomes the more recent pronouncements by black leaders acknowledging the central role of values in uplifting the black underclass, such as occurred last year during the annual meeting of the Congressional Black Caucus. Speaking to a primarily black audience, Jesse Jackson charged them to use the "power of character" to deal with the problems of teen pregnancy, drug abuse, and black-on-black crime—a decided shift from the traditional rhetoric of blaming these pathologies on white oppression. Loury also has only kind words for the growing number of programs offered by churches, benevolent societies, and social clubs within the black community to encourage responsible male involvement in parenting, prevent unplanned pregnancies, support young single mothers, and the like.

Loury's prescriptions are clearly recognizable as "black conservatism." At the core of *One by One* is the proposition that future black progress and, ultimately, genuine equality will be achieved only through a commitment at the "individual level" to embrace a specific set of values. Loury doesn't scant political activism, but he insists that the primary vehicle for empowerment is individual action. He is similarly adamant about the inherent superiority of two-parent families, the need for self-discipline, and the commitment to take the moral high ground, divorced from external considerations. Loury argues that only through exceptional moral and social conduct, along with an individual commitment to educational and professional excellence, will we as a society be able to bring about the conditions for uplifting the most troubled segments of the black community.

By focusing on external contributors to the plight of the black underclass, the NAACP and the Southern Christian Leadership Conference have helped erode black communities' historical commitment to self-reliance.

BUT LOURY AVOIDS BEING IDEOLOGICAL to a fault: In his vision, self-help need not preclude financial and other aid from the state. For Loury, the principal way government can aid blacks is by providing them with a good education. If this means race-targeted and preferential spending on black education, so be it. He is unequivocal in his view that this may involve spending more on "public institutions that serve large numbers of poor black people."

I agree with Loury that such a policy is appropriate, with the proviso that the "quality" of education for blacks not be measured primarily in terms of relative dollars spent. Perhaps the greatest historical American transgression was to free slaves into a society in which they were ill-equipped to effectively survive. The legacy of poorly educated blacks remains one of the central issues in contemporary America's racial dilemma.

Loury offended my sensibilities only once, during a discussion of "social capital"—the associations, benefits, and support networks that characterize upper-class white experience, a kind of ready accessibility to other people who are going places, to people who will one day end up in powerful circles. Loury suggests that a black "adolescent with an aptitude and interest for academic matters" might have trouble finding the peer groups and larger social networks that engender upward mobility. Loury believes that government intervention can help offset the lack of social capital in the poor black community.

But are urban black communities so bereft of upwardly mobile individuals that social capital cannot be developed? I know of no neighborhoods, even among the poorest and most crime ridden, that do not have churches. Churches have routinely served as a meeting place for the best individuals a neighborhood has to offer and they continue to serve as a place for not just spiritual development, but personal and social development as well.

In fact, much of what I personally learned about navigating life, about presenting myself to a broader society, and about gaining entrance into upwardly mobile groups, I learned from a little inner-city church in a New York ghetto. As a product of the inner city, I find it inconceivable that an adolescent intent on finding a support group would be unable to do so.

This minor point aside, *One by One from the Inside Out: Race and Responsibility in America* is an insightful and elucidating work. Those interested in facing and solving the problems of this nation's black underclass will want to make sure they don't overlook these essays.

Errol Smith is a Los Angeles radio personality and businessman. He is the author, with Matt Ember, of 101 Reasons Not To Be a Liberal *(St. Clair René Publishing).*

The Science of Art

By Gregory Benford

The Culture of Hope, by Frederick Turner, New York: The Free Press, 250 pages, $23.00

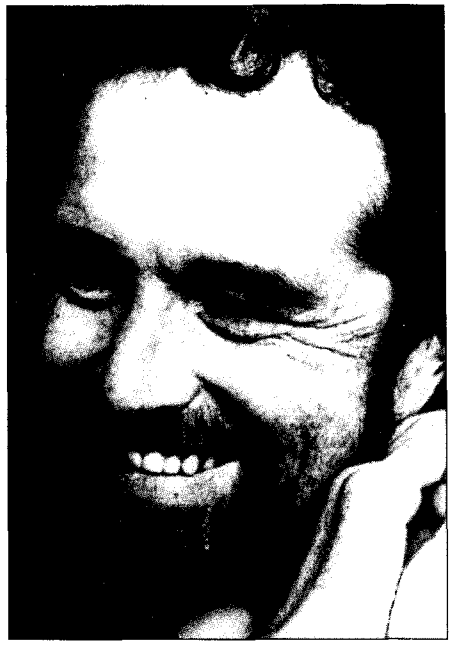
IN THIS RADICAL, INSIGHTFUL INSPECTION of our cultural times, Frederick Turner proposes a quiet revolution. He believes that with "postmodernism" we have suffered through a cultural twilight and are about to enter a great cultural epoch, deeply classical and informed by modern science: the "radical center."

He holds the academy, particularly the humanities, guilty of confusion and shoddy thinking. "Like the Jodie Foster character in *The Silence of the Lambs*, we have gone to school with monsters, with the Hannibal Lecters (or cannibal lecteurs) who, in biting the text into pieces with their deconstructive slashes and parentheses, have bitten off the faces of their authors."

Turner has written distinguished criticism, fiction, even epic poetry about transforming Mars. A professor of arts and humanities at the University of Texas, Dallas, he takes no prisoners, left or right:

"The radical center sees that the avant-garde and the conservatives share certain metaphilosophical assumptions, inherited from the nineteenth century...." The left loves entropy, while the right sees our salvation from shrinking resources in the Invisible Hand's market. This split leads to art's "desperate crisis of originality, its failure to find an audience, and its isolation from vital intellectual currents in the human and natural sciences, religion, technology, and the environmental movement." To some on the left, "we are free only if we can perform a gratuitous act with no sense or reason." To others, art must serve political ends: Both views crush creativity.

While Turner sees our present capitalist markets as "our closest approximation to date" to natural "value-production," he adroitly describes how the right barricades the past against the present. It "believes in the pretty; it denies shame by exporting to the outside all the unpleasantness and smell of our lives....Its final state is the terminally bland." Rejecting shame means omitting our mammalian selves, which the right often offloads onto the "social, racial or sexual Other."



Frederick Turner: He claims a return to classicism in the arts is only natural.

His radical center embraces evolution—in biology and in physical processes—as the producer of order in novel forms. "Chaos theory tells us that beautiful 'attractors' can underlie apparent chaos, and that highly ordered systems can, through iteration, [and] feedback ...generate entirely unpredictable emergent properties."

The world is neither running down nor deterministic, and a strict division of order versus chaos is just wrong. Such ignorance leaks into culture. Turner condemns "the bankruptcy of postmodern fictional self-consciousness," noting that one genre "has continued triumphantly to satisfy the requirement of a full-blooded and healthy art: science fiction." There, art

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rubs against science, extending the fresh visions available at the flowering center of science. Science fiction is the sole art able to do this without flinching, sentimentalizing, or recapitulating the postures of the romantic era; in this is it truly modern, and so seldom uses postmodern devices.

Turner foresees that "postmodernism is destined, like the late eighteenth century 'picturesque' movement, to be seen as only a transitional phase into a new period of cultural history that does not need to be labeled feebly with a modification of its predecessor's name."

AMERICA, THE LEADING WESTERN SOCIety, has "found the knack of listening to and absorbing other cultural values." The essential, classical values come from "deep neurobiologically based grammars, as does language itself, that are common to all cultures." Turn to the genuinely universal art forms and genres, he urges, which give us poetic meter, musical tonality and scale, methods of visual imaging and motifs, mythical structures. His radical center, then, "rejects the ethnocentricism of the Right, but it also rejects the demonization of the West by the Left."

Turner turns to nature, particularly viewed through chaos theory and the gathering theories of emergent order, as the true spirit of our century's science, and a deep source for the arts. Lazy ignorance of these ideas has served the arts poorly.

A view of nature as dense and nonlinear is at the core of our contemporary science. Process and order emerge subtly. "A single human brain possesses more potential brain states than there are particles in the universe. More happens in a year in one of our forests than has happened on Mars for the past million centuries. Thus any ideology which is based on the 'tiny insignificant speck' worldview (such as that we might as well give up the enterprise of civilization and devote ourselves to exciting as many of our membranes as possible before we die) is founded on a false premise."

This leads to a broad attack on many currently fashionable views. Turner accuses the feminist worldview of resorting to "elaborate theories of conspiracy, in which the patriarchy masks itself behind legalism and science." This ironically leads to a feminist vision mistaking the stuffy conservatism of many institutions for a diabolically clever Establishment, wily and cunning beyond plausibility. He puts his finger on the paranoia feminism inherited from Marxism, and its fantasy prehistory of a benign matriarchy, overthrown by Bad Males back before the wheel. Feminists' deepest error is their confusion over whether men and women are different, and how. That confusion could be helped by contributing to the ongoing studies of primate behavior and sociobiology, but few feminists see biology as a productive arena; they would rather snipe at it from afar, ritually reciting their mantra of "social construction"—the view that there is little truth afoot in the world, only our perceptions.

Turner turns to nature, particularly viewed through chaos theory and the gathering theories of emergent order, as the true spirit of our century's science, and a deep source for the arts. Lazy ignorance of these ideas has served the arts poorly.

Turner's attacks are adroit, often convincing, but one must be familiar with the debate to catch the nuances. Art, criticism, and both high and low culture get their lumps.

MUCH OF HIS VISION IS ROOTED IN BIOLogy as the paradigm model of emergent order. "We have a nature; that nature is cultural; that culture is classical. Our literary and artistic nature is inscribed in our central nervous systems" in such diverse features as our universal preference for poetic meter and narrative, particularly of an unselfconscious yet mythic dimension.

Much scientific evidence from the neurosciences, twin studies, sociobiology, physical anthropology, and genetics strongly implies that the nature/nurture balance is roughly 70/30 or even 80/20. The central myth of the late modern then, that we are born as blank slates to be written on by culture, is largely wrong.

Beauty, too, emerges from our biology. Our peculiar capacities lead to a natural classicism, connected to our neurotransmitters and endorphins. Rather than Freud's equation of the aesthetic with a sublimated libido, a model of brain reward implies that certain "lores" are privileged. Poetic meter has a line length of about three seconds, tuned to the period of acoustic processing pulses in our brains. We remember by internal echo for three seconds, then pass that to a longer-term memory system, which edits, organizes, and pushes the bit down to a less immediate level. Drive a natural brain rhythm, like the 10-cycles-per-second alpha rhythm, and large changes of brain state and chemistry follow. Poetry gets processed not by merely the linguistic left brain, but by the musical and spatial right brain. This stereo neural mode gives fresh power to ideas which are genuinely nonverbal.

Avant-garde music then often goes astray because it fails to use our wiring diagram effectively. Similarly, postmodern aesthetics' demand that we treat every visual element as significant, avoiding hierarchies, misses an audience. A species which used such a viewing strategy would be unable to throw a rock, dodge a spear, or catch falling fruit. Our "marvelously parsimonious cortical world-construction system" leads to a set of classical values, to which Turner predicts we shall soon return.

In the end, postmodern art is obscene not because it is offensive, but because it is boring. A "bankrupt tribe of venal mediocrities who now infest the arts" decry the philistine mass, failing to note their

own unmoored ideas, principally the notion that reality is socially constructed.

Turner shores up his general argument with many pungent observations, and a few winding, fantastical digressions which lose the thread—he gives in to his sense of the epic. This gives a glimpse of his prescience, but at the price of coherence.

Still, this cogent, broad analysis will make many enemies, and deserves to be read for that alone; delicious cuts and thrusts abound. Unlike nearly all the culture warfare swirling about the maypole of politics, Turner's vision is positive.

Pay attention to the world, he says. It instructs.

Gregory Benford is professor of physics at UC Irvine and the author of Timescape, *among other novels.*

Brief Review

Lost Rights: The Destruction of American Liberty, by James Bovard, New York: St. Martin's Press, 335 pages, $24.95

IN *LOST RIGHTS*, JOURNALIST JAMES Bovard chronicles the shockingly accelerating disappearance of the rights and freedoms of the ordinary American. Bovard has established himself through his two previous books (*The Fair Trade Fraud* and *The Farm Fiasco*) and countless columns as the preeminent exposer of government's responsibility for rigged deals, under-the-table handouts, special-interest ripoffs, and spectacular waste. Now he moves to a larger canvas: the whole range of government interference with the rights and liberties of the individual citizen.

"We face a choice not of anarchy or authoritarianism," writes Bovard, "but a choice of limited government or unlimited government." What have we chosen? After 335 bloodcurdling pages, it is crystal clear that, whatever the American people might have chosen, what they have gotten is virtually unlimited government. And when government has no limits, its subjects have no liberty.

Bovard's style is rapid fire. An indefatigable researcher, he inundates the reader with horror upon horror in a veritable tsunami of government atrocities. In the first page of the first chapter, he presents a vivid and wide-ranging summation of the different ways government can tyrannize today:

"The attack on individual rights has reached the point where a citizen has no right to use his own land if a government inspector discovers a wet area on it, no right to the money in his bank account if an IRS agent decides he might have dodged taxes, and no right to the cash in his wallet if a DEA dog sniffs at his pants. A man's home is his castle, except if a politician covets the land the house is built on, or if his house is more than fifty years old, or if he has too many relatives living with him, or if he has old cars parked in his driveway, or if he wants to add a porch or deck. Nowadays a citizen's use of his own property is presumed illegal until approved by multiple zoning and planning commissions. Government redevelopment officials confiscate large chunks of cities, evicting owners of homes and giving the land to other private citizens to allow them to reap a windfall profit. Since 1985, federal, state, and local governments have seized the property of over 200,000 Americans under asset forfeiture laws, often with no more evidence of wrongdoing than an unsubstantiated assertion made by an anonymous government informant.

"Government officials now exert vast arbitrary power over citizens' daily lives, from Equal Employment Opportunity Commission bureaucrats that can levy a $145,000 fine on a Chicago small businessman because he did not have 8.45 blacks on his payroll to federal agricultural bureaucrats that can prohibit Arizona farmers from selling 58 percent of their fresh lemons to other Americans. Customs Department inspectors can wantonly chainsaw import shipments without compensating the owner, Labor Department officials can nullify millions of employment contracts with a creative new interpretation of an old law, and federal bank regulators are officially empowered to seize the assets of any citizen for allegedly violating written or unwritten banking regulations."

The 10 chapters of *Lost Rights* contain the frightening details of these and many, many other invasions of liberty by governments beyond citizen and judicial control. The modern American police state has its way with its people through zoning, asset forfeiture, historic preservation, wetland controls, scenic rivers, urban renewal, marketing orders, antidumping laws, Superfund, banking regulations, licensing, labor regulations, gun control, union protection, transit monopolies, public school control, disability rules, and anti-pornography laws. Those who resist the dictates of the phalanx of repressive agencies at the local, state, and federal level are dealt with summarily, from fines and court orders on to outright murder and massacre, as at Ruby Ridge and Waco.

Bovard appears to be the most exhaustive researcher in the country. *Lost Rights* features over 2,000 footnotes, ranging from daily newspaper stories to court cases to congressional hearings. The evidence is overwhelming, and terrifying. We are losing our liberties, with no organized force or leadership working to reverse this terrifying trend.

Bovard concludes, "The time has come to face up to the pervasive failures and to radically reduce government officials' power to coerce, expropriate, and subjugate other Americans. The American people placed its faith in the State, and the State failed. We need a new faith in individual liberty."

More accurately, we need to revive the old faith. But if the last bit of American liberty glimmers and dies, consumed by the onrushing power of the uncontrolled and uncontrollable state, it will not be because no one sounded the warning. James Bovard has done so, powerfully and exhaustively. Our only hope to remain a nation of free people is for enough people to absorb this message, and resolve to reclaim their liberty and the genius of the Old Republic.

—John McClaughry

Wedge-O-Matic

By Thomas W. Hazlett

Affirmative action slices and dices our common bond.

Is the Democratic Party, already passed over by those in the *Titanic* rafts as too far gone to save, headed for Really Big Trouble? The answer is: affirmative.

Democratic retainers are pulling their hair out as they scrape for a dodge on affirmative action. Even liberal Democrats in Congress tossed in the towel on what they had so recently (and adamantly) fought for: tax preferences for minority millionaires buying FCC licenses. The measure repealing the preferences, cosponsored by Rep. Bob Matsui (my Clintonite congressman), encountered fewer than 50 "no" votes in a U.S. House of Representatives that six months ago would have killed such a bill as dutifully as O. J.'s lawyers dispense of unfavorable evidence.

The Republican Party is being accused of cynically exploiting affirmative action as a "wedge" issue, a ploy to divide and conquer the American public. In truth, the GOP leadership should be brought up on charges of political malpractice for gutlessly steering clear of this issue for three decades.

The catalyst for the recent national debate is the California Civil Rights Initiative, a 1996 ballot measure concocted by a former philosophy teacher and an anthropology professor at Cal State-Hayward. How embarrassing can this be for professional Republican Party campaign tricksters—to get scooped by a couple of bespectacled profs?

The anti–affirmative action sentiment is tarred by the press as "angry white guy" backlash. But this is the view that cynically divides people. Why is it a truism that only those who are officially discriminated against can oppose an unjust and counterproductive system? Indeed, an NBC/*Wall Street Journal* poll finds that while 68 percent of white males oppose the policy, 57 percent of everyone else does too. In other words, even among those who are officially awarded "frequent discrimination miles" under the affirmative action laws, a vast majority believes it to be a scam.

The cynicism of which affirmative action apologists speak is actually found on the government-mandated forms we fill out to indicate our race and gender. The division of people is as neat and simple as a check mark. Americans are "wedged" by affirmative action's paperwork.

In an electoral nutshell, affirmative action programs are wildly unpopular with the public, but are wildly popular with civil rights leaders, feminists, attorneys, university professors, *Washington Post* journalists, and three sensitive white guys in Madison, Wisconsin. The first group encompasses just about everyone who votes in America; the latter group encompasses just about everyone who contributes time, money, or favorable publicity to the Democratic Party.

Party leaders are enamored of affirmative action because it has proven a gold mine not to the oppressed masses but to a select number of elites, typically ensconced in high-paying public-sector jobs. The arithmetic reveals a marketing problem. But the party's franchise outlet owners prevent a solution. Panic is setting in.

To ordinary Americans, the most offensive aspect of affirmative action is that it creates a bureaucratic ranking of social pain. The task is of such outrageous complexity that we must settle for gross categorizations—black, Hispanic, female, Aleut, etc. The government then deals out chits for offenses thought to have been suffered by those "victims" lucky enough to be in the wrong place at the wrong time—genetically speaking.

The moral repugnancy of affirmative action is reinforced by the operational lunacy of the system: Everyone on this planet knows the hardship they have endured, and it is infinitely more important to them than the pain endured by their great, great grand-whatevers. We do not arise in the morning bemoaning the shellacking that Generation F or Q took in the 1400s or the 1800s. Yet we all go down with migraines over the piddling little slights and insults that whack us in the face and render us all battered children of cruel fate.

Indeed, it is this essential compatibility of experience that links all humanity with a common bond, and drives not only our desire for brotherhood but our respect for those who exude dignity in the enterprise of living. For the state to pull rank and declare that its accounting system of social pain—a simplistic stereotyping by skin color and the presence or absence of one moving part—is sufficiently wise to be law is quite absurd. And rude.

The struggle to overcome is ubiquitous, and the government's racist and sexist handicapping is an insult to every man, woman, and child who gamely tries to surmount life's challenges.

It may well be true that this cursed cycle of public policy began with the vile behavior of the southern segregationists. Indeed, Sen. Hubert Humphrey presciently accused Dixiecrats of sandbagging his 1964 Civil Rights Act by predicting the measure would lead to reverse discrimination. That was a cynical fabrication to undercut a noble cause, bellowed Humphrey. He was right then. And he is right today.

Contributing Editor Thomas W. Hazlett teaches economics and public policy at the University of California at Davis.

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THE AMERICAN SPECTATOR®

ACCORDING TO THE WORLD BANK, SEVERAL HUNDRED MILLION WOMEN AND CHILDREN SPEND THEIR DAYS IN DWELLINGS WHERE WOOD AND COW DUNG ARE BURNED FOR ENERGY. The fumes are indoor air pollutants. Breathing them is like smoking three packs of cigarettes per day. The World Health Organization reports 4 million Third World children die each year from acute respiratory disease, no doubt exacerbated by such fumes.

In the United States the air we breathe is healthier because we use electricity as a primary energy source. The way we deliver electricity is a technological triumph and the envy of the world. Our well-being is the direct result of widespread availability of electricity made cheaply because of wide use of coal.

Given our accomplishments, it would be logical for our national leaders to promote the United States as a model for achieving human well-being and development abroad. But because the radical environmental agenda is set on controlling US energy policy, the reverse is true. In international circles, narrowly focused environmentalists and our own Department of State encourage lesser-developed nations to single-mindedly pursue conservation and distributed renewable generation technologies. At present, these technologies are inefficient and expensive.

REPEAL RIO

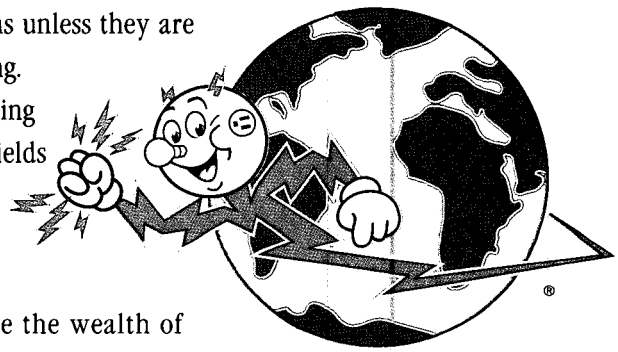
Electrify the World

Policymakers resist urging Third World electrification using our advanced technologies for large-scale, efficient, and economical central station electric generating units that are fossil-fueled.

The justification for this kind of thinking is the Rio Treaty with its focus on limiting carbon dioxide emissions—and as signed in 1992 by former President George Bush with the advice and consent of the US Senate. Should the Rio Treaty be turned into the world's energy law? The answer is "no."

Rio is premised on a one hundred year old theory that catastrophic global warming will result from burning fossil fuels because they emit CO_2, a greenhouse gas. This controversial theory has no support in observations. In the intervening century, climate observations suggest the theory should be discarded, not used as a pretext to curtail industrial activity.

Predictions of future climate conditions generated by general circulation computer models are what the environmental community relies on in defense of *Rio*. But these models are intentionally manipulated so that they predict apocalypse. Existing models cannot replicate actual climate conditions unless they are manipulated. As a result, they fail the first test of computer modelling.



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Earth's climate *is* changing—gradually. Winter nights are warming and summer days appear to be cooling, promoting greater crop yields and more robust forests. CO_2 fertilization of the atmosphere helps produce more food for people and wildlife. Wildlife can flourish in more abundant habitat.

Women and children in the Third World are not at risk because the wealth of industrialized nations results in CO_2 emissions. Their lives are at risk because their present way of life pollutes their environment. Electrification provides a cure for pollution. But the Third World can never realize the benefits of electrotechnologies so long as energy policy is shaped by limited environmental understanding.

Extending electric service to villages can have a powerful impact. It would free Third World populations from drudgery, greatly improving their living standards and, therefore, their quality of life. In this way, repealing *Rio* would be positive for humanity. **Let's electrify the world with our technology and know-how.**

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